Supreme Court, U.S.
FILED

No. (1) 99 52 JUL 2 - 1999

OFFICE

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, et. al.,

Petitioners,

–against–

DOROTHY NASH-HOLMES, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the judicially created doctrine of absolute immunity insulates a state prosecutor from all judicial inquiry into the constitutionality of his conduct before an investigatory grand jury and for causing the arrest of an individual without probable cause; and whether, in deciding questions of immunity, the federal courts may disregard a state court's factual finding that there was no probable cause to support an arrest.

2. Whether it is consistent with the Seventh Amendment for federal courts to resolve disputed questions of material fact in favor of the defendants in order to grant summary judgment to defendants on the basis of absolute or qualified immunity.

LIST OF THE PARTIES TO THE PROCEEDING BELOW

PARTIES IN 97-15275

Petitioners (Plaintiffs-Appellants Below)

HERB HALLMAN CHEVROLET, INC., a Nevada Corporation[1]
JOHN P. STANKO

Respondents (Defendants-Appellees Below)

DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County
DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County
FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
WASHOE COUNTY, a political subdivision of the State of Nevada

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[1] Herb Hallman Chevrolet, Inc. has no parent company or subsidiary companies.

PARTIES IN 97-15323

Petitioners (Plaintiffs-Appellants Below)

JERRY VAN DER HOEVEN
JAMES BAYUS
STAN BONDICK
CRAIG CONRAD
TOM GEORGE
RON HALL
JOHN JULIAN
JUDY LIMON
DAN MAHONEY
EDWARD J. MATTS
RON SHERK
GREG STEWARD
ALEX VARGO
CLIFFORD SOUZA

Respondents (Defendants-Appellees Below)

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County
DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County
FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
WASHOE COUNTY, a political subdivision of the State of Nevada

CITY OF RENO, a municipal corporation
RICHARD C. KIRKLAND, individually and in his official capacity as Chief City of Reno Police Department
JAMES WESTON, individually and in his official capacity as Deputy Chief of the City of Reno Police Department

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The Opinion by the Court of Appeals for the Ninth Circuit is reported at 169 F.3d 636 (9th Cir. 1999), and is set forth in the Appendix at App. 1. The Orders denying the petitions for rehearing are unreported and are set forth in the Appendix at App. 21 and App. 23. The Opinions and Orders of the District Court for the District of Nevada are unreported, and are set forth in the Appendix at App. 25 and App. 37.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 3, 1999. A petition for rehearing and rehearing en banc was filed by plaintiffs-appellants and was denied by Order entered on April 16, 1999. A petition for rehearing was filed by defendants-appellees and was denied by Order entered on April 29, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

1. Procedural History

In July 1993, a Washoe County grand jury, after a year long investigation, convened and presided over by defendant-respondent Donald Coppa, the Chief Deputy District Attorney of Washoe County, returned an 81 count indictment charging plaintiff-petitioner Herb Hallman Chevrolet, Inc., a Chevrolet/Geo dealership in Reno, Nevada (the "dealership"), plaintiff-petitioner John P. Stanko, the owner of that dealership, and fifteen of the dealership's former and current employees (also plaintiffs-petitioners herein) with 409 separate felony

offenses. The District Attorney held a press conference and Stanko and his employees were quickly arrested.

Nearly a year later, before the criminal trial was scheduled to commence, a Washoe County Deputy District Attorney, with the approval of Coppa and defendant-respondent District Attorney Dorothy Nash-Holmes, after being directed by the Nevada state court to indicate where in the grand jury record there was any evidence to support the charges, voluntarily dismissed all of the charges against Stanko and the dealership (and most of the charges against the remaining employees), conceding that there was not even "slight or marginal evidence" to support them. Shortly thereafter, the state court, in a scathing 173 page opinion detailing repeated instances of gross prosecutorial abuse, dismissed the remaining charges.

Stanko and the dealership commenced an action, pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Nevada against the three district attorneys from Washoe County who had instituted the investigation and later conceded the absence of probable cause to support the arrest warrants; three District Attorney investigators; and Washoe County itself. Jurisdiction in the District Court was based on 28 U.S.C. § 1331 and 1343. Some time later, Stanko's employees filed a substantially similar action.

On August 26, 1996, the District Court granted partial summary judgment to all of the defendants in both cases on the ground that the defendants had absolute immunity for all conduct after the date when the investigative grand jury was impaneled, and qualified immunity for virtually all conduct before that date. Judgment was entered on January 13, 1997.

Petitioners filed timely notices of appeal. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. On March 3, 1999, the Court of Appeals for the Ninth Circuit, which had

consolidated the two cases, affirmed the judgment of the District Court.

2. Statement of the Facts

In late 1990, a disgruntled customer of the dealership, Rick Wells, complained to the Reno Police Department that someone at the dealership had forged his name on a rebate assignment form, allowing the dealership to steal his $600.00 factory rebate. The Reno Police Department investigated and, in July, 1991, turned the matter over to the Washoe County District Attorney's office. Wells also filed a complaint with the Department of Motor Vehicles Bureau of Enforcement (the "DMV"), which conducted its own investigation. In November, 1991, the DMV closed its file, concluding that Wells had received credit for the rebate and communicating the result of its investigation to the police. (CR1-69, ex. 6, 7; RE 341, 371-75)

The DMV, with its expertise, realized that the dealership had handled the rebate in an appropriate fashion by deducting the rebate directly from the lease price and assigning it to the dealership, instead of setting the price without consideration of the rebate and then having the manufacturer transfer the rebate directly to the customer. Nevertheless, the District Attorney's office, unfamiliar with auto financing, decided to conduct a thorough investigation of the complaint. (RE 178, 371-72)

Stanko, in an effort to cooperate, turned over Wells' file, made his employees available for interviews, and provided the investigators with rebate information on twelve other customers. (CR1-73, ex. 8)

On January 14, 1992, Coppa, the Chief Deputy District Attorney, approved a search warrant (which was executed in full view of the media) for three months of the dealership's business records. The affidavit in support of the warrant, drafted by the

defendant investigators, and approved by Coppa, alleged that there was probable cause to believe that a salesman at the dealership had committed two crimes: obtaining money by false pretenses and engaging in deceptive trade practices. (RE 348, 354; CR1-73, ex. 8)

The affidavit also set forth that Wells was not advised of the rebate, that his signature on a rebate assignment form and power of attorney had been "confirmed" to be a forgery, and that documentation on a married couple, the Peases, customers who did not recall receiving a rebate, did not reflect that they had received a rebate in their transaction. The affidavit, however, did not inform the judicial officer of several other material facts that the defendants had learned during this investigation: that Wells had received credit for the rebate as part of his transaction, that he had a criminal record for vehicular fraud, that he had been trying to rescind his transaction with the dealership, that Wells' signature was a "simulated forgery" and the handwriting expert had not been able to link the forgery with anyone at the dealership or rule out Wells as the forger, and that the Peases, as well as the dealership's eleven other customers during this time period, had received credit for the rebate. (RE 342-47, 371-84; CR1-73, ex. 8, ex. 9)

On March 23, 1992, Coppa prepared another application for a search warrant, this one seeking a vast array of additional documents. (RE 356-69)

After investigating the dealership for over a year, and obtaining voluminous records, on July 8, 1992, Coppa began a year long grand jury investigation into the dealership's "business practices." Coppa did not identify for the grand jurors what crimes they were investigating. Instead, he announced at the opening session, and at each session thereafter, that the grand jury's purpose was to continue the "investigation" into the dealership's practices. (CR1-73, p. 4-5, ex. 2; RE 182, 301-03)

Nearly one year from the date this investigative grand jury was convened, on the night before the grand jury's term was set to expire, Coppa handed the grand jury a massive indictment containing 81 separate counts and charging 409 felony offenses, including charges of racketeering, against 16 separate defendants. By 8:20 a.m. the next morning, the grand jurors (most of whom had failed to attend a significant portion of the proceedings) returned the indictment. (RE 134, 262-65)

Armed with this indictment, Coppa prepared and obtained bench warrants for the arrest of Stanko and fifteen of his employees. District Attorney Holmes convened a press conference to announce the arrests. (CR1-67, ex. F)

The defendants moved to dismiss the indictment. The Nevada trial court held four days of hearings. (CR1-73, ex. 6; RE 168) During the hearings, the court asked the Deputy District Attorney, Gary Hatlestadt, to demonstrate where in the record there was evidence to support each of the counts against each of the defendants. In response to the court's questioning, Hatlestadt openly acknowledged that there was "not even slight or marginal evidence" to support the vast majority of the charges. Then, with Coppa's and Holmes' approval, Hatlestadt stipulated to the dismissal of 315 of the 409 charges, including all of the charges against Stanko and the dealership.[1] (RE 134-37, 170-71, 268-70, 278, 327-28) As the state court later put it, "One mistaken indictment is too many. 318 mistaken indictments is a travesty." (RE 278)

The state court reviewed some 3,350 pages of grand jury testimony, and 144 grand jury exhibits. Then, in a detailed opinion that found that the grand jury was "investigative" in nature (RE 182-83, 301-02), the state court dismissed the

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[1] Three other charges had earlier been dismissed. (RE 170)

indictment in its entirety. Although there were many grounds for the dismissal, including gross prosecutorial abuse of the grand jury function and deliberate withholding of exculpatory evidence, the state court repeatedly noted that there was not even slight or marginal evidence to support the remaining charges. (RE 180, 278, 309, 316-24) The state court expressed "shock[] that these defendants [plaintiffs-petitioners] have been subjected to criminal charges, public vilification, and enormous economic loss based upon a proceeding so flawed and unfair." (RE 169-70, 180, 278, 309, 316-24)

No further criminal proceedings were ever brought against Stanko, the dealership, or any of the employees.

3. The Federal Court Proceedings

After being completely vindicated in state court, Stanko and fifteen of his employees -- who were investigated for three years and arrested without probable cause, all under the glare of the media -- sought to hold the prosecutors and the investigators liable for this violation of their civil rights. But the federal courts presiding over their constitutional claims utterly ignored the state court proceedings -- both the prosecutor's concession as to the lack of probable cause for 318 of 409 charges, and the state court's findings: (1) that this was an investigative grand jury; (2) that the prosecutors had abused the grand jury process; and (3) that there was insufficient evidence to support the charges that were not voluntarily dismissed. Instead, on a motion for summary judgment, after resolving all factual disputes in favor of the defendants, the District Court found that the prosecutors had probable cause to arrest the plaintiffs from the moment the grand jury was impaneled. (App. 39-40) The Ninth Circuit affirmed this finding. Tossing aside the state court ruling with the disdainful note that it did not "endorse [its] holding" (App. 18), the Ninth Circuit, reading the evidence in the light most favorable to the defendants, held that the defendants were

absolutely immune from suit because, in the Ninth Circuit's view, there was probable cause to believe that the plaintiffs had committed, not the crimes with which they were charged, but unspecified and unidentified "crimes under Nevada law." (App. 15)

The Ninth Circuit, again affirming the District Court, also found, reading the evidence in the light most favorable to the defendants and resolving all factual disputes in defendants' favor, that the defendants had qualified immunity from suit from all claims arising out of the allegedly illegal search and seizure of the dealership's records. (App. 10-13)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE AMBIGUITY IN THE LAW AS TO WHETHER PROSECUTORS WHO CONVENE AN INVESTIGATIVE GRAND JURY ARE ABSOLUTELY IMMUNE FROM SUIT BEFORE THEY HAVE PROBABLE CAUSE TO MAKE AN ARREST, AND TO DECIDE THE RELATED AND IMPORTANT QUESTION OF WHETHER A FEDERAL COURT CAN DISREGARD STATE PROCEEDINGS THAT ESTABLISH THE ABSENCE OF PROBABLE CAUSE

It is not unusual for federal civil rights cases to be brought after a state court has had a chance to comment on or review the conduct of the state officials who have allegedly violated the plaintiff's constitutional rights. Ordinarily, federal courts, in the interest of comity, pay attention to what the state court has said, and even defer to factual findings that are not clearly erroneous. 28 U.S.C. § 2254. See also Thompson v. Keohane, 516 U.S. 99 (1995). But, as this case amply demonstrates, in the civil rights area, when addressing questions

of immunity, the federal courts apparently do not believe they owe the same degree of deference, or indeed any deference, to a state court's factual findings that state officials engaged in gross improprieties before an investigative grand jury and that there was no probable cause to support the mass arrests of sixteen individuals.

This Petition raises important questions not only about the breadth of the judicially created doctrine of prosecutorial immunity, but also about the nature of federal-state relations. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), this Court held that a prosecutor does not have absolute immunity for investigative functions, even if an investigation is run through the auspices of a grand jury, and does not act as an advocate before there is probable cause to have someone arrested. This Petition asks this Court to clarify that holding. The Petition also asks this Court to determine whether, in deciding immunity questions, it is appropriate for a federal court to disregard entirely proceedings in the state court that established the absence of probable cause. Finally, the Petition questions whether the federal courts may construct "probable cause in the abstract" for crimes never spelled out either in the indictment or the arrest warrant, and whether that abstract "probable cause" can then become the justification for absolutely immunizing the state officials responsible for the arrest.

1. Clarification Is Needed On The Question Of Whether A Prosecutor Is Acting As An Advocate In Connection With His Conduct Before An Investigative Grand Jury.

42 U.S.C. § 1983 provides that "every person" who acts under color of state law to deprive another person of "any rights, privileges or immunities secured by the Constitution and laws," shall be liable in damages. An arrest without probable cause violates the Fourth Amendment and gives rise to a claim for

damages under Section 1983. See, e.g., Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997).

Section 1983 is expansive, and, on its face, provides for no immunities. Nevertheless, this Court has held that the statute generally contemplates at least some of the immunities traditionally recognized at common law. Imbler v. Pachtman, 424 U.S. 409, 418-19 (1976); Malley v. Briggs, 475 U.S. 335, 340 (1986).[2] However, this Court has also stressed that the courts must be "quite sparing" in recognizing claims to absolute immunity. Forrester v. White, 484 U.S. 219, 224 (1988); Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1983). The "role [of the courts] is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." Malley, 475 U.S. at 342.

This Court has adopted a "functional" approach to determining whether a prosecutor is absolutely immune from suit, that looks to the "nature of the function performed, not the identity of the actor who performed it." Forrester, 484 U.S. at 229. Under this approach, a prosecutor is absolutely protected for conduct relating to "initiating a prosecution and ... presenting the State's case," provided such action is "intimately associated with the judicial phase of the criminal process," but has only qualified immunity when "engaged in certain investigative activities." Imbler, 424 U.S. at 430-31.

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[2] In fact, it is not entirely clear that prosecutors enjoyed absolute immunity at common law for prosecutions commenced maliciously and without probable cause. See Note, Prosecutorial Immunity: Imbler, Burns and Now Buckley v. Fitzsimmons, The Supreme Court's Attempt To Provide Guidance In A Difficult Area, 1994 B.Y.U.L. Rev. 663, 665, citing Newell, Malicious Prosecution, False Imprisonment And The Abuse Of Legal Process (1892).

Applying this functional approach, the Court has restricted the prosecutorial activities which are absolutely immune from suit. The Court has held that a prosecutor enjoys only qualified immunity for giving legal advice to the police. Burns v. Reed, 500 U.S. 478 (1991). The Court has also held that a prosecutor is not absolutely shielded from suit for a claim based on the fabrication of evidence later introduced to an investigatory grand jury, in part, because, in the language most critical to this Petition, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have any one arrested." Buckley, 509 U.S. at 274. And more recently, the Court held that a prosecutor is not accorded absolute immunity for providing sworn testimony in support of an arrest warrant. Kalina v. Fletcher, 118 S. Ct. 502 (1997).

Although this Court has followed its own admonition to be sparing in the granting of absolute immunity, the standards for determining when a prosecutor is acting as an advocate and when he is acting as an investigator are anything but clear. Buckley itself contains internally inconsistent language, stating that there is no absolute immunity before there is probable cause to have someone arrested, but at the same time suggesting that there is absolute immunity even absent probable cause, if the grand jury has returned an indictment. 509 U.S. at 274, and n.5. Moreover, while the Court recognized that a grand jury may serve two functions -- that it may be convened to "conduct a more thorough investigation of the crime" or it may be convened "to return an indictment against a suspect when there was already probable cause to arrest," Id. at 275, the Court did not make clear whether a prosecutor who participates in a grand jury investigation is acting as advocate or an investigator.

The lower courts have grappled with how to deal with what even this Court acknowledged was a "difficult" question. Imbler, 424 U.S. at 431, n.33. A few courts, carefully parsing the plaintiff's claims, have recognized that the mere institution of

grand jury proceedings does not automatically convert a prosecutor into an advocate. See, e.g. Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995), cert. denied, 519 U.S. 820 (1996) (holding that prosecutor had absolute immunity for presenting misleading testimony to grand jury, but only qualified immunity for claim that he intimidated witnesses into changing their testimony); Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) (no absolute immunity for causing the defendant's arrest without probable cause or for falsifying videotaped evidence later introduced before the grand jury). But, other courts, like the Ninth Circuit here, have viewed the institution of grand jury proceedings -- regardless of the whether, as the state court found here, the grand jury was functioning as an investigative body -- as a bright line, insulating the prosecutor from all liability even if the prosecutor is using the grand jury as the functional equivalent of citizen police. See, e.g., Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999) (holding that prosecutor could not be held liable for any actions that took place after "initiation of the grand jury proceeding"); Jones v. Cannon, 1999 WL 292673 (11th Cir. 1999) (grand jury indictment insulates defendants from all liability based on false arrest claim); Smith v. Gribetz, 958 F. Supp. 145 (S.D.N.Y. 1997) (presentation of evidence to a special grand jury to investigate wrongdoing at utility absolutely insulated defendant district attorney since he intended to indict the plaintiff).

The case law is anything but consistent. This Court itself has written about the unique position that the grand jury plays in our criminal justice system -- that, in theory, it does not function as a branch of any of the institutions of government, but as an entirely separate entity with power to investigate on merely a suspicion of wrongdoing. United States v. Williams, 504 U.S. 36, 47-50 (1992). See also United States v. Dionisio, 410 U.S. 1, 16 (1973) (the Fifth Amendment presupposes that the grand jury is an investigative body acting independently of the prosecutor or the judge).

In effect, because of confusion over what constitutes an investigative function once a grand jury has been convened, a prosecutor can insulate himself from all judicial inquiry into his conduct by the simple expedient of convening a grand jury and then using the grand jurors as quasi-investigators. Then, by obtaining an indictment (which, as the case demonstrates, can be accomplished by simply handing the grand jurors a document for them to sign), the prosecutors can cause the public arrests of the suspects, without probable cause, and still be protected by absolute immunity.

That does not appear to be what this Court intended. In Buckley, this Court noted that "a prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." Buckley, 509 U.S. at 276. But, unless this Court further explains how the lower courts are to evaluate a prosecutor's function and determine whether a prosecutor who has convened a grand jury to conduct an investigation is acting as an investigator or as an advocate, it is likely that the decisions will continue to be inconsistent, incomprehensible, and as this case seems to suggests, outcome determinative.

2. Clarification Is Needed On Whether A Prosecutor Is Ever Entitled To Absolute Immunity Before There Is Probable Cause To Have Someone Arrested And The Degree Of Deference Owed To State Court Determinations On The Absence Of Probable Cause.

This Court should also clarify what it meant in Buckley when it said that a prosecutor is not acting as an advocate before there is probable cause to have someone arrested. While the Court seemed to imply that a prosecutor always functions as a police officer when he secures an arrest warrant without probable cause and is protected then like investigators, by the doctrine of

qualified immunity, it is unclear whether a prosecutor who prepares judicial papers in order to effect an arrest without probable cause, but who deliberately falsifies evidence or is motivated purely by malice, is nonetheless insulated from suit because he is performing a "lawyer's" function. This case presents the Court with a perfect opportunity to address that question.

In connection with that inquiry, this Court should address the level of deference the federal courts should grant to the state courts if they have first examined the circumstances that led to the arrest and have found the absence of probable cause. In this case, during a lengthy hearing, in response to the state court's inquiry, the prosecutor explicitly admitted that there was no probable cause to support any of the charges against Stanko, the dealership, or the majority of the employees. And, the state court itself dismissed the remaining charges against the remaining employees after explicitly noting that it had "serious concerns about the sufficiency of the evidence" and "serious doubts whether there is even slight or marginal evidence to support" those charges. (RE 180, 278, 309, 316-24)

In any other context, these state court proceedings would be entitled to deference. After all, it is the state court that thoroughly reviewed all 3,350 pages of grand jury testimony, and heard four days of argument, and it is the state court that was most likely to appreciate whether the state authorized grand jury was functioning as an investigative body and whether there was any evidence to support the crimes charged in the indictment. But rather than defer to the state court, the Ninth Circuit not only held that it was not "bound by the [prosecutor's] characterization of the facts"(meaning his concession in open court that there was no probable cause to support the charges) (App. 15-16), but also held that, because the doctrine of collateral estoppel did not technically preclude relitigation of the issue, it could choose,

without further explanation, to disregard entirely the state court's findings. (App. 16)

There is a delicate relationship between our state and federal judicial systems, particularly in the criminal justice area, where federal courts are often asked to rule on the propriety of state court decisions. In the interests of comity, the federal courts generally respect state court rulings, particularly factually based rulings, that are not clearly erroneous. The determination of probable cause is an "objective (albeit fact specific) question." Anderson v. Creighton, 483 U.S. 635, 641 (1987). This Court should grant review in this case to address whether, in a federal civil rights action, similar deference is owed to a state court's factual rulings criticizing its own governmental officials and finding that there is no probable cause to support an arrest.

Finally, perhaps recognizing that, on this record, it could not hold that there was probable cause to support the crimes with which the plaintiffs were actually charged, the Ninth Circuit did something far worse: it "found" that there was probable cause to believe that the plaintiffs had committed some other unidentified and uncharged "crimes under Nevada law." (App. 15)

The Ninth Circuit's decision is both unprecedented and dangerous. It creates a concept of "probable cause in the abstract." A prosecutor no longer need show that there is probable cause to support the actual charges stated in the arrest warrant. He can arrest someone for a crime for which there is no probable cause and then justify what appears to be an unconstitutional arrest by theorizing that there might be other crimes for which there was probable cause. That is a notion completely alien to our criminal justice system and to what the Fourth Amendment demands.

If the Ninth Circuit view is correct, and is adopted by other federal courts, there is no Fourth Amendment violation if

a prosecutor maliciously arrests someone without probable cause and publicly convenes a press conference (as in this case) announcing the arrest, if he later speculates that there might have been probable cause to arrest the individual for some other, perhaps unrelated and lesser, crime. The individual, like the plaintiffs in this case, whose reputation may well be permanently ruined, is left with no forum in which to defend himself against the accusation that he committed some unidentified crime.

The rationale of the Ninth Circuit, in effect, allows a federal court to create a theoretical version of what should have taken place, but did not, in order to protect even the most incompetent or corrupt state officials. The protection afforded by the civil rights statutes, indeed the entire purpose of the civil rights statutes, is undercut by this judicial short-circuiting of the probable cause requirement.

The devastating impact of this approach to the Fourth Amendment is well illustrated in this case. Here, sixteen individuals were charged with hundreds of counts of racketeering, and were arrested for these highly inflammatory crimes only after the District Attorney convened a press conference to publicize the indictments and forthcoming arrests. When it came time to go to trial, the prosecutors conceded that they did not even have slight or marginal evidence to support the vast majority of the charges. The possibility that a few of the salesmen (and the Ninth Circuit did not bother to distinguish among the plaintiffs) may have committed some impropriety does not remedy the wrong done to those improperly branded as racketeers and, if the civil rights laws are to have any teeth, should not provide a basis for immunizing the prosecutors and their investigators from all judicial inquiry into their conduct. Mass arrests without probable cause cannot be permitted to become the constitutional norm.

The lower courts are plainly grappling with questions of prosecutorial immunity and how to interpret this Court's complex decisions in this area. This case provides an opportunity for this Court to address those questions and clarify the level of immunity that should be accorded a prosecutor who convenes an investigative grand jury and then effectuates arrests without probable cause.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE SEVENTH AMENDMENT PRECLUDES A COURT FROM GRANTING SUMMARY JUDGMENT, EVEN ON A QUESTION OF IMMUNITY, WHEN THERE ARE MATERIAL FACTS IN DISPUTE

"In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Nevertheless, recognizing that there are competing policy concerns, this Court has strengthened the doctrine of qualified immunity so that it provides protection to "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). This Court has also made it clear that questions of immunity should, whenever possible, be determined at the earliest possible stages of litigation. Anderson v. Creighton, 483 U.S. 635, 645 n.6 (1987).

But this Court has not had an opportunity to address whether the policy reasons for encouraging summary judgment on the legal issues that underlie most immunity questions also means that the lower courts should abandon the traditional rules that apply to summary judgment motions,[3] or whether the

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[3] Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted only if the

Seventh Amendment to the Constitution, which protects the right to a jury trial in civil actions, precludes summary judgment when there are factual issues in dispute.

In this case, plaintiffs alleged that the affidavit in support of the first search warrant was deliberately misleading. The plaintiffs claimed, with strong legal support, that a government official cannot hide behind the shield of immunity when he submits an affidavit that contains statements that are either knowingly or recklessly false and the affidavit contains insufficient truthful allegations to support a finding of probable cause. See, e.g., Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995).

On a summary judgment motion, plaintiffs' factual allegations about the information that was deliberately omitted from the affidavit, and that rendered the affidavit materially misleading, should have been taken as true. Among those allegations -- all of which were supported by substantial testimony and/or documentary evidence -- were claims that the following material information was omitted from the affidavit: that Wells, the complainant, had received credit for his rebate; that he had a criminal record for committing fraud in connection with a vehicle transaction; that the Department of Motor Vehicles Bureau of Enforcement had reviewed the transaction and found that it had been handled properly; that Wells's signature was a "simulated" forgery, which meant that the expert could not identity anyone at the dealership as the forger or even rule out Wells, who had been trying to rescind the transaction, as the source of the forgery; and that the twelve other customers whose transactions involved rebates all received credit for their rebates, including the Peases.

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moving party's submission demonstrates that "there is no genuine issue as to any material fact."

Had traditional rules governing summary judgment been applied, the existence of these factual allegations, supported by proof, would have precluded the grant of summary judgment to the defendants. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As this Court has made clear:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255.

That did not happen here. The Ninth Circuit repeatedly decided factual issues by accepting the defendants' challenged version of the events. Virtually every fact relied on by the Ninth Circuit to support its analysis was disputed. By way of example: (1) The Ninth Circuit stated that the record "suggest[ed]" that Wells never received his rebate. (App. 11) That was disputed and was demonstrably untrue. (2) The Ninth Circuit stated that the Peases did not receive credit for their rebate. (App. 7-8) That was disputed. Plaintiffs introduced evidence to demonstrate that the Peases had signed the rebate over to the dealership and had received credit for it. (3) The Ninth Circuit stated that the handwriting expert found that was "no basis for identifying [Wells] as the writer." (App. 11-12) That was disputed; indeed, the expert testified that he could not rule out Wells as the forger. (4) The Ninth Circuit stated that the DMV investigator would have reopened the investigation had he known of the forgery. (App. 12) That was disputed. In fact, the DMV investigator testified that he prepared his finding already knowing that the

"signature on the rebate form was irregular." (RE 383) (5) The Ninth Circuit stated that there were other forgeries. (App. 15) That was disputed. In fact, one of the defendants admitted that, after seizing 151 files, the defendants discovered a signed rebate assignment form in every file in which there was a rebate and that there was no evidence that any of these documents were forged.

The Seventh Amendment guarantees federal civil litigants a right to have a jury resolve factual disputes. There is little question that had this summary judgment involved anything but an immunity issue, a court would deny summary judgment since there were an extraordinary number of material facts in dispute. But, perhaps because of this Court's suggestion that immunity questions be determined on summary judgment whenever possible, the Ninth Circuit decided that it could accept the defendants' version of the facts since that version, and only that version, would provide a legal basis for the grant of qualified immunity.

Without reading the record on appeal in every summary judgment case involving a question of immunity, it is impossible to ascertain whether the type of judicial inquiry conducted by the Ninth Circuit in this case is routine throughout the federal system. The public cannot realistically check whether an appellate court is resolving factual disputes in the civil rights area by reading the facts in the light most favorable to the government officials seeking immunity. The only check -- and the only way that the civil rights statutes can survive the ever expanding, judicially created immunities that limit their protections -- is for this Court to intervene in a case such as this one, where the abuse of the summary judgment device is so palpable, and instruct the lower courts that, even when facing questions of governmental immunities, the Seventh Amendment precludes summary judgment when there are factual issues in

dispute and prohibits a court from determining the facts in a manner that favors the party seeking to avoid a jury trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-15275

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; DONALD COPPA; KARL HALL; FRANK LANDES; JOHN J. LONG; MICHAEL NEVILLE; WASHOE COUNTY,
Defendants-Appellees.

JERRY VAN DER HOEVEN; JAMES BAYUS; STAN BONDICK; CRAIG CONRAD; TOM GEORGE; RON HALL; JOHN JULIAN; JUDY LIMON; DAN MAHONEY; EDWARD MATTS; RON SHERK; GREG STEWARD; ALEX VARGO; CLIFFORD SOUZA,

No. 97-15323

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for

OPINION

Washoe County; FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; JOHN LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; COUNTY OF WASHOE, a political subdivision of the State of Nevada,
Defendants-Appellees.

JERRY VAN DER HOEVEN; JAMES BAYUS; STAN BONDICK; CRAIG CONRAD; TOM GEORGE; RON HALL; JOHN JULIAN; JUDY LIMON; DAN MAHONEY; EDWARD MATTS; RON SHERK; GREG STEWARD; ALEX VARGO; CLIFFORD SOUZA,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County; FRANK D.

LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; JOHN LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; COUNTY OF WASHOE, a political subdivision of the State of Nevada,
Defendants-Appellees.

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-16976

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; DONALD COPPA; KARL HALL; FRANK LANDES; JOHN J. LONG; MICHAEL NEVILLE; WASHOE COUNTY,
Defendants-Appellees.

Appeals from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted
January 12, 1999--San Francisco, California

Filed March 3, 1999

Before: Joseph T. Sneed, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Sneed

COUNSEL

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OPINION

SNEED, Circuit Judge:

Herb Hallman Chevrolet, Inc.--a Reno automobile dealership--its owner, John Stanko ("Stanko"), and employees (collectively "Hallman Chevrolet") appeal from a grant of summary judgment by Judge David Warner Hagen of the United States District Court for the District of Nevada, in a consolidated 42 U.S.C. § 1983 civil rights action alleging prosecutorial misconduct by Washoe County, three county prosecutors and three county investigators (collectively "Washoe prosecutors"). On appeal, Hallman Chevrolet argues that the Washoe prosecutors are not entitled to immunity from suit for deliberately omitting facts and making false statements in support of two search warrants and impaneling a Washoe County grand jury without probable cause. Hallman Chevrolet attributes these constitutional violations to the individual defendants and to Washoe County because, they contend, the Washoe prosecutors were acting pursuant to

Washoe County policy. Finally, Hallman Chevrolet argues that the district court erred in awarding defamation-related attorneys' fees to the Washoe prosecutors.

We affirm the district court's ruling against Hallman Chevrolet on the merits, but reverse its award of attorneys' fees.

I.

BACKGROUND

In late December 1990, Rick Wells complained to the Reno Police Department that Hallman Chevrolet appropriated his $600 factory rebate, due on a new car purchase, by forging his signature on a rebate assignment form. Wells recounted his dealings with Hallman Chevrolet to police in a written statement, which follows in part:

> On 10-14-90, I signed the Lease Agreement and took possession of the van. I was told on [10-13-90 or 10-14-90] or both of these dates that rebates were not being offered. . . . Later, I questioned [salesman] Ron Hall again as to rebate offerings and was told that there were none. I was told by Ron Hall and J.J. that I could purchase the van for $500 over cost regardless of the method of financing. I gave them a mercantile check in the amount of $4,000 to be held until 11-11-90 . . . . I was told by J.J. and Ron Hall that leasing would save me $80 to $100 per month . . . . On 11-2-90, I went . . . to my credit union . . . [and] spoke with a loan officer who quoted a much lower rate than the lease. . . . On [ ] 11-6-90 . . . my loan application [was] approved.

I then contacted [Hallman] Chevrolet . . . and notified [them] that I had decided to purchase the vehicle for the $500 over invoice that we had agreed to . . . . I received a call back from Dan with a very hostile tone saying . . . . I had signed a [lease] contract and would be held to it. When I questioned him as to why I could not purchase as per our original agreement at $500 over invoice, he turned the phone over to Ron Hall who said he was going to lose a bonus check if I bought the vehicle and that I should "just bring the rig back". I was also threatened with legal action. Due to the hostile and abusive tone of our conversation, I . . . [stopped] payment on the down payment check . . . on 11-6-90. . . . On 11-9-90, I telephoned John Stenko [sic], one of the owners who said he had sent me a certified letter . . . . which he [read over the phone]. . . . [H]e offered a price of $20,212, which I accepted over the phone. . . . I then went to the [dealership] to get a receipt and noticed rebate list memo taped to the podium. . . . I decided first to get verification direct from Chevrolet . . . .

Then on 12-23-90, I went to the dealership. Ron Hall was in the lot and I asked him what had happened to my $600 rebate. He said rebates weren't being offered on my vehicle, at which time I told him he was lying, that I had a letter [dated 12-11-90] from Chevrolet to prove it and they had stolen my money.

. . . [General Sales Manager] Mr. Souza said I had signed over the rebate and I told him I wanted to see the paper. He got my file and showed me . . . . I advised him that the signature

was a forgery and that unless he wished to got to court, I wanted my money. He refused to offer the rebate and I advised both he and Ron Hall that I was going to pursue this and that somebody was going to jail.

On May 8, 1991, Wells underwent a polygraph examination at the Reno Police Department and the examiner concluded that Wells was speaking truthfully. On July 2, 1991, the county handwriting analyst determined that the signature in question "exhibits the characteristics of a`simulated forgery.'" On July 19, 1991, police forwarded their report to the Washoe County District Attorney's Office where it was assigned to Assistant District Attorney Karl Hall ("A.D.A. Hall").

On November 27, 1991, District Attorney investigators ("D.A. investigators") confronted owner Stanko. In response to the D.A. investigators' accusation that Hallman Chevrolet forged Wells' signature on the rebate form, Stanko stated that Wells had authorized the dealership to reproduce his signature. In support of his claim, Stanko voluntarily produced two power of attorney forms purportedly signed by Wells and a list of rebates ("Rebate Recap Sheet") credited to the dealership. The D.A. investigators submitted the power of attorney forms to the county handwriting analyst who concluded that there was "no basis for identifying [Wells] as the writer." Investigators discovered that the forms, even if signed by Wells, did not authorize the dealership to reproduce his signature on other documents. Investigators returned to the dealership to question Stanko regarding the discrepancies, whereupon he angrily refused to cooperate.

D.A. investigators began to contact other customers listed on the Rebate Recap Sheet, including Daniel and Donna Pease (the "Peases"). The dealership received a $500 rebate from Chevrolet for the Peases' transaction, but the Peases apparently did not receive credit for the rebate. Although Daniel Pease confirmed

that it was his signature on the rebate assignment form, neither he nor his wife remembered salesman Hall mentioning a rebate.

At this point, D.A. investigators decided to seek a search warrant because they believed they had probable cause to suspect Hallman Chevrolet of criminal conduct. A.D.A. Hall drafted an application for the search warrant which a magistrate issued on January 23, 1992. Four days later, D.A. investigators executed the warrant and seized 151 transaction files.

In the week following the execution of the warrant, one current and two former Hallman Chevrolet employees voluntarily came forward to confirm dealership policies encouraging salesmen to engage in fraudulent and unfair business practices. They stated that it was dealership policy not to tell customers about rebates and to get them unknowingly to assign their rebates to the dealership.

D.A. investigators began to examine the sales files obtained in the first search. They contacted dozens more customers and learned that, in many cases, the dealership retained down-payments, trade-ins, and rebates without ever applying the credit to customers' leases to reduce their capitalized costs. They also discovered that the dealership had charged customers for extended warranties they specifically refused or never received. From February until mid-March 1992, D.A. investigators identified seventeen of the most clear and convincing instances of fraud and conducted taped interviews with those customers.

Washoe prosecutors obtained a second search warrant which they executed on March 27, 1992. With this warrant, they seized 1,700 transaction files. After reviewing the files and interviewing dozens of customers, investigators again selected the transactions containing the most convincing evidence of fraud and conducted taped interviews with those 35 customers.

The D.A. investigators also continued to interview former dealership employees. In April 1992, former employee William Dallman stated that he had observed salesmen forging names on rebate assignment documents and that it was common practice to add the cost of an extended warranty to the purchase price without informing the customer. He also described how the dealership falsified customer credit applications in order to obtain approval from banks for customer loans. Another former employee, Bobby Atkerson, stated that he once overheard three salesmen discussing the forgery of a customer's signature. When the discussion ended, Atkerson entered the room and observed a piece of paper with sixteen versions of customer Rick Wells' signature. Additionally, he confirmed that salesmen added warranties without customer consent and were instructed not to mention rebates.

Based on this and other evidence, Assistant District Attorney Donald Coppa ("A.D.A. Coppa") impaneled a Washoe County grand jury on July 8, 1992. Before presenting the evidence, A.D.A. Coppa told the grand jury that they were investigating the "business practices" of Hallman Chevrolet and its employees. In twenty sessions over the next year, the grand jury heard personal sworn testimony from seventy-seven witnesses--nearly all of whom had been interviewed prior to the proceedings--and received over 3,200 pages of documents and transcripts. On July 2, 1993, the grand jury returned an eighty-one count indictment, the largest in the history of the county, charging seventeen Hallman Chevrolet employees with 409 felony offenses. Trial was set for May 4, 1994. Just before trial, however, Deputy District Attorney Gary Hatlestad ("D.D.A. Hatlestad") voluntarily dismissed most of the charges because, according to him, A.D.A. Coppa had made a fundamental pleading error in the indictment by treating accessory suspects as principals. In a lengthy decision, Nevada state court Judge Whitehead dismissed the remaining charges with prejudice based on what he found to be egregious prosecutorial misconduct.

The Washoe prosecutors appealed the decision to the Nevada Supreme Court, but the newly elected D.A. dismissed that appeal before it was heard. Following the dismissal, Hallman Chevrolet filed this civil rights action in the United States District Court for the District of Nevada. The district court granted the Washoe prosecutors' motion for summary judgment and awarded them fees for the defamation-plus litigation. Hallman Chevrolet now appeals. We affirm the district court's grant of summary judgment, but reverse its award of fees.

II.

STANDARDS OF REVIEW

We review de novo the district court's grant of summary judgment, *see Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995), and resolve all factual disputes in favor of Hallman Chevrolet, *see Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). This Court also reviews de novo the district court's decision to afford public officials qualified or absolute immunity. *See Hervey*, 65 F.3d at 788. We review for abuse of discretion the district court's award of attorneys' fees to the Washoe prosecutors. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983); *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992).

III.

DISCUSSION

A. *Investigative Immunity*

[1] Hallman Chevrolet first contends that the Washoe prosecutors are not immune from suit for their investigative activities. We disagree. A prosecutor may only shield his investigative work with qualified immunity. *See Buckley v.*

Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209 (1993). The qualified immunity question turns on the "objective legal reasonableness" of the action. *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1125 n.5 (9th Cir. 1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987)). It is not objectively reasonable for a prosecutor deliberately or recklessly to misstate or omit facts material to the existence of probable cause. *See id.* at 1126.

[2] Hallman Chevrolet asserts that the Washoe prosecutors misrepresented material facts in affidavits supporting two search warrant applications.[1] Hallman Chevrolet claims that customer Wells received credit for his rebate and that the Washoe prosecutors misrepresented that fact. The record, however, suggests otherwise. More importantly, the Washoe prosecutors were reasonable to believe otherwise. During his polygraph examination, Wells made a sworn statement, which the polygraph analyst found to be truthful, that he never received his rebate. Moreover, the county handwriting analyst determined that Wells' signature was a probable forgery. The Washoe prosecutors were also aware that owner Stanko and several Hallman Chevrolet employees had given different versions of the events to Wells, the police and D.A. investigators. Furthermore, despite numerous opportunities, Hallman Chevrolet failed to produce any documentary evidence or reliable testimony refuting Wells' version of the events. Hallman Chevrolet next argues that the Washoe prosecutors deliberately misled the magistrate by calling the signatures in question "confirmed" forgeries. We disagree. These signatures clearly exhibit the signs of forgery. According to the Washoe County handwriting expert, they

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[1] An affiant, Reno Police Detective Robert McDonald, was not a named defendant, but according to Hallman Chevrolet, the affidavit itself was drafted by A.D.A. Hall. For purposes of summary judgment, that assertion is assumed true.

differed from Wells' known writing style and there was "no basis for identifying [Wells] as the writer."

[3] Hallman Chevrolet also asserts that the Washoe prosecutors deliberately omitted material facts in their affidavits. To show that an omission is material, "[t]he plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause." *Hervey*, 65 F.3d at 789. The standard for determining probable cause under Nevada law is whether there is "slight, even marginal, evidence" to support the charge. *State v. Boueri*, 672 P.2d 33, 36 (Nev. 1983).

[4] Although the Washoe prosecutors did omit facts from their affidavits, none of these facts was material. For example, Washoe prosecutors omitted the fact that the Department of Motor Vehicles ("DMV") had made an inquiry and determined that Hallman Chevrolet did not owe any rebate money to Wells. This fact was, however, immaterial because the DMV investigator made his determination without knowing of the alleged forgery. The DMV investigator later acknowledged that he would have reopened the Wells investigation had he known of the forgery. In addition, Washoe prosecutors neglected to state that Hallman Chevrolet voluntarily turned over Wells' file and that an investigation of twelve other customers revealed only that one couple did not recall being told of their rebate. When viewed in context, however, these facts do not suggest Hallman Chevrolet's innocence. Despite Hallman Chevrolet's initial cooperation, owner Stanko quickly refused voluntarily to produce documents or otherwise assist authorities in the investigation. Moreover, the same salesman who apparently defrauded Wells was also involved in the other suspect transaction.

[5] Washoe prosecutors did not disclose to the magistrate that Wells had been convicted earlier of bank fraud involving a vehicle loan and had a possible motive to allege fraud.

These facts might bear on Wells' credibility. However, the Washoe prosecutors corroborated Wells' story by administering a polygraph examination, submitting documents to a handwriting specialist, and taking the sworn statement of another customer who had a similar experience with the same salesman. Thus, a neutral and detached magistrate would have found probable cause even if the Washoe prosecutors had included these unfavorable facts.

In sum, the Washoe prosecutors did not intentionally omit or misrepresent any facts–that were material to the finding of probable cause. Nor did they act otherwise to destroy their investigative immunity.

B. *Prosecutorial Immunity*

Hallman Chevrolet next contends that the Washoe prosecutors are not entitled to the protection of absolute immunity for their activities after the initiation of grand jury proceedings because they functioned as investigators rather than advocates. We reject this contention.

[6] A prosecutor performing an advocate's role is an officer of the court entitled to absolute immunity. *See Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L. Ed. 2d 209. A prosecutor's acts in the course of his role as an advocate "include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* The Supreme Court has recognized that "prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. " *Burns v. Reed*, 500 U.S. 478, 490 n.6, 111 S. Ct. 1934, 1941 n.6, 114 L. Ed. 2d 547 (1991).

[7] The Washoe prosecutors functioned as advocates in the grand jury proceedings. By the time the grand jury was impaneled, the

Washoe prosecutors had completed a vast majority of the investigation and, prior to the impanelment, virtually every witness had been interviewed and every exhibit compiled. After A.D.A. Coppa impaneled the grand jury, he sought an indictment primarily by presenting to the grand jury the witnesses he had already interviewed and the evidence he had previously gathered.

[8] Nonetheless, Hallman Chevrolet insists that the Washoe prosecutors are not entitled to the protection of absolute immunity because they lacked probable cause to impanel the grand jury. Under federal law, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274, 113 S. Ct. at 2616, 125 L. Ed. 2d 209. The degree of strength required to establish probable cause is determined by state law. *Berg v. Leason*, 32 F.3d 422, 425 (9th Cir. 1994).

[9] The Nevada standard for determining probable cause is whether there is "slight, even marginal, evidence " to support the charge. *Boueri*, 672 P.2d at 36. "The state need only present enough evidence to create a reasonable inference that the accused committed the offense with which he or she is charged." *Id.; accord LaPena v. Sheriff*, 541 P.2d 907 (Nev. 1975). In *Boueri*, the defendant was accused of embezzling money from his employer, Caesar's Palace, where he worked as vice-president in charge of hosting affluent guests. 672 P.2d at 36. As part of his duty to induce such persons to visit Caesar's, defendant would arrange complimentary air fare in the name of guests through a local travel agency. See id. According to Caesar's policy, when defendant sought refunds from the travel agency for unused tickets, checks were to be made out directly to Caesar's. *See id.* Caesar's policy did not authorize defendant to receive cash refunds for unused tickets. *See id.* At the grand jury hearing, however, the travel agent stated that the agency usually issued checks to the order of cash and delivered them to defendant. *See id.* Yet, neither Caesar's nor its guests ever received the money.

See id. The court's "logical inference" from these facts was sufficient to establish probable cause that defendant had embezzled the money. *See id.*

[10] In the present case, the Washoe prosecutors had probable cause exceeding that recognized in *Boueri*. After a year-long investigation, the Washoe prosecutors had compiled hundreds of supporting documents and interviewed dozens of witnesses, including former employees and customers. As a result of this investigation, the Washoe prosecutors had ample and convincing evidence that Hallman Chevrolet employees had forged customers' signatures, withheld rebates, retained customer down-payments intended to reduce principal balances and made material misrepresentations to customers.

Nonetheless, Hallman Chevrolet contends that probable cause did not exist at the time the grand jury was impaneled. First, it argues that D.D.A. Hatlestad admitted that "there was not even `slight or marginal evidence' " to support any of the charges and that admission is controlling. Second, it argues that the Nevada state court ruling that Washoe prosecutors did not have probable cause is controlling. We reject both arguments.

First, D.D.A. Hatlestad did not admit that the Washoe prosecutors acted without "slight or marginal evidence." He actually stated that "the counts were not, *as pleaded*,[2] supported by slight or marginal evidence . . . . [But] an arresting officer, acting either with or without an arrest warrant, would have had *probable cause to believe that each of the named defendants had committed crimes* under Nevada law and could have arrested them accordingly" (emphasis added). Contrary to Hallman

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[2] According to the Washoe prosecutors, A.D.A. Coppa made a fundamental pleading error in drafting the indictment by failing to identify conduct which would cause an accessory to be responsible as a principal.

Chevrolet's position, D.D.A. Hatlestad's statement actually affirms the existence of probable cause. Nonetheless, we are not bound by his characterization of the facts.

Second, we are not precluded by the Nevada state court ruling on the question of whether there was probable cause because the Nevada state court did not reach this issue. It was neither "actually litigated" nor "necessarily decided" in the state court. Under Nevada law, collateral estoppel applies when an issue is "actually litigated" and "necessarily determined" in a prior proceeding, and the parties in the two proceedings are the same or in privity. *See Marine Midland Bank v. Monroe*, 756 P.2d 1193, 1194 (Nev. 1988). Thus, we reject Hallman Chevrolet's preclusion argument.

C. *Alleged Unconstitutional County Policy*

Hallman Chevrolet next claims that A.D.A. Coppa's actions served as a cognizable basis for the imposition of liability against Washoe County because he exercised policy-making authority in violation of Hallman Chevrolet's constitutional rights.

[11] "[M]unicipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452 (1985). "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 477, 106 S. Ct. at 1297, 89 L. Ed. 2d 452 (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978)).

[12] The Washoe prosecutors, including A.D.A. Coppa, performed their duties in good faith--properly establishing probable cause in seeking both search warrants, convening the grand jury and making arrests. In light of the fact that the Washoe prosecutors did not violate Hallman Chevrolet's constitutional rights, we need not address the question of whether A.D.A. Coppa was a policymaker for the purpose of attributing his actions to Washoe County.

D. *Attorneys' Fees for Defamation-plus Claim*

[13] Hallman Chevrolet also claims that the district court erred in awarding attorneys' fees to the Washoe prosecutors for the so-called "defamation-plus"[3] claim. We agree. District courts are authorized to award attorneys' fees to a prevailing defendant in civil rights cases only in those exceptional cases when the action is unreasonable, frivolous, meritless, or without foundation, or when the plaintiff continues to litigate after it clearly becomes so. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 701, 54 L. Ed. 2d 648 (1978) (interpreting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988); *see also Franceschi v. Schwartz*, 57 F.3d 828, 832 (9th Cir. 1995).

[14] In this case, Hallman Chevrolet's claim for defamation-plus was not frivolous. There are two ways to state a cognizable § 1983 claim for defamation-plus: (1) allege that the injury to

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[3] A § 1983 action requires that a claimant plead more than mere injury to reputation. The injury to reputation must be joined with an injury to a liberty or property interest protected by the due process clause of the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693, 703, 96 S. Ct. 1155, 1161, 47 L. Ed. 2d 405 (1976); *see also Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) (citation omitted). Hence, the label "defamation-plus."

reputation was *inflicted in connection* with a federally protected right; or (2) allege that the injury to reputation *caused the denial* of a federally protected right. *See Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991). Hallman Chevrolet asserted a defamation-plus claim under each of these methods.

1. *Injury in connection with a federally protected right.*

First, Hallman Chevrolet argued that the Washoe prosecutors injured its reputation in connection with the deprivation of its federally protected right to be free from unlawful searches, seizures and arrests. Hallman Chevrolet adequately alleged all of the elements of defamation-plus, including the allegation that the Washoe prosecutors made defamatory comments in connection with indictments and arrests for which there was no probable cause. Even though the district court eventually granted summary judgment on the issue of probable cause, it was reasonable for Hallman Chevrolet to believe that the defamation-plus claim had merit. The claim had survived an earlier motion to dismiss which this Court recognizes as evidence that the claim is not without merit. *See Jensen v. Stangel*, 762 F.2d 815, 818 (9th Cir. 1985).

Moreover, the state court order implied that the facts would support a defamation-plus claim against the Washoe prosecutors. We draw attention to the state court order not to endorse its holding, but instead to demonstrate the reasonableness of Hallman Chevrolet's defamation-plus claim. According to the state court, the Washoe prosecutors disregarded Nevada state law throughout the grand jury process. In an excoriating judgment, Nevada District Judge Jerry Whitehead stated:

> The undersigned has never before witnessed a criminal indictment in a serious case where the procedures that have been established to insure fairness were so disregarded and ignored. The

> Court is shocked that [Hallman Chevrolet has] been subjected to criminal charges, public vilification, and enormous economic loss based upon a proceeding so flawed and unfair. Our system was designed to avoid such abuses of official power, but the system failed [Hallman Chevrolet] in this case.

Nevada v. Bayus, Order, No. CR93-1259 at 4-5 (Nevada 2nd Dist., April 26, 1994). The state court order clearly influenced Hallman Chevrolet. In its opening brief, Hallman Chevrolet quotes a section of the state court order titled "Prejudicial Pre-Trial Publicity By The District Attorney" which states that the District Attorney made comments with the "clear intent" to "improperly influence" the court and the jury. In light of the state court order and the defamation-plus claim's survival of an earlier motion to dismiss, it is reasonable to assume that Hallman Chevrolet genuinely disputed the district court's conclusion and continued to litigate because it felt compelled to preserve the separate defamation-plus issue for appeal.

2. *Injury causing denial of a federally protected right.*

In its second claim for defamation-plus, Hallman Chevrolet contended that the Washoe prosecutors' defamatory statements deprived it of business goodwill, a state property right that is afforded constitutional protection. In holding this claim to be frivolous, the district court stated that "nothing in [Hallman Chevrolet's] papers" makes the showing that business goodwill is a property right protected under Nevada state law and that a "mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, *unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims."* (emphasis added).

[15] The district court, however, apparently overlooked the relevant portion of Hallman Chevrolet's papers. In fact, Hallman Chevrolet cited specific cases[4] for the principle that business goodwill is a protected property right in Nevada. Despite the complexity of the law in this area, Hallman Chevrolet made a genuine attempt to assert its claim under the law of Nevada. Moreover, Hallman Chevrolet relied almost entirely on the earlier state court judgment which strongly suggested that the Washoe prosecutors had violated Hallman Chevrolet's constitutional rights. Under these circumstances, we hold that it was error to find the defamation-plus claim unreasonable or frivolous.

[16] For these reasons and in light of the well-established rule that a defendant should only receive an award of attorneys' fees in extreme cases, we hold that the district court abused its discretion in making such an award. Each party shall bear its, his or her own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

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[4] In their papers opposing the motion for summary judgment, Hallman Chevrolet cited *Ford v. Ford*, 782 P.2d 1304, 1308 (Nev. 1989) and *Zales-Las Vegas v. Bulova Watch*, 396 P.2d 683, 689 (Nev. 1989).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-15275

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-15323

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant

District Attorney for Washoe
County; DOROTHY NASH-HOLMES,
individually and in her official
capacity as District Attorney for
Washoe County; et al.,
Defendants-Appellees.

HERB HALLMAN CHEVROLET, INC., a
Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-16976

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellants' petition for rehearing and for rehearing en banc is denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
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No. 97-15275

v.

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DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

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D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant

District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County; et al.,
Defendants-Appellees.

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-16976

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

Appellees' petition for rehearing is denied.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HERB HALLMAN CHEVROLET, INC., a Nevada corporation, and JOHN P. STANKO, an individual,

Plaintiffs,

vs.

DOROTHY NASH HOLMES, et al.,

Defendants.

_____/

CV-N-94-33-DWH

ORDER

By an amended complaint (#5), plaintiffs--a local automobile dealership ("Champion") and its owner ("Stanko")--sue defendant--prosecutors and investigators from the Washoe County District Attorney's Office ("the D.A. defendants") and Washoe County–for various constitutional violations under 42 U.S.C. § 1983 and various state law torts arising out the criminal investigation and prosecution of plaintiffs by defendants and the Reno Police Department ("RPD"). Before the court are the parties' papers on the issue of absolute immunity (#s 67, 68, 73, 76, 78), on defendant Washoe County's motion for summary judgment (#s 51, 71, 74), and on the D.A. defendants' motion for summary judgment (#s 69, 75, 79). No oral argument was requested, and, due to the extensive briefing, the court finds oral argument unnecessary.

PLAINTIFFS' CLAIMS

In summary, plaintiffs' lengthy amended complaint alleges the following, making scattershot allegations of

constitutional violations throughout: the D.A. defendants, under custom or policy of Washoe County, advised and assisted RPD in illegally obtaining and executing invalid search warrants of Champion in January and March of 1992; they illegally retained property seized during those searches; they illegally had plaintiff Stanko arrested; they illegally employed a grand jury to investigate and indict plaintiffs without probable cause; and, throughout the above events, they defamed plaintiffs to the media and to plaintiffs' customers.

The amended complaint sets forth eight "claims for relief": (1) deprivation of constitutional rights and conspiracy to deprive plaintiffs of constitutional rights in violation of 42 U.S.C. § 1983, seeking damages, fees, and costs; (2) failure to train by Washoe County, resulting in the above violations; (3) declaratory and injunctive relief to remedy the above violations; (4) punitive damages based on the above violations; (5) defamation; (6) conversion; (7) interference with contractual relations; and (8) intentional infliction of emotional distress.

ANALYSIS

I. Absolute Immunity

As described more fully in the court's order entered March 1, 1996 (#65), the procedural posture of this case led the court to order the parties to brief it on the issue of absolute immunity. The D.A. defendants complied with that order (#67), contending, in a nutshell, that the prosecutors are absolutely immune from all of plaintiffs' claims except for defamation and failure to train, and that the investigators are absolutely immune to the same extent from July 8, 1992--the date the grand jury was impanelled–to the present. Washoe County joined that brief (#68). Plaintiffs responded by moving for partial summary judgment in their favor on the issue of absolute immunity (#73). Alternatively, they requested additional discovery pursuant to

Federal Rule of Civil Procedure 56(f) prior to the court's ruling on absolute immunity. Additionally, plaintiffs requested that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." #73 at 2. Defendants then replied (#76, supplemented by #78), which closed the briefing on this issue.

The court set forth the principles of absolute immunity as applied to prosecutors and investigators in its order of March 1, 1996 (#65), and hereby incorporates that discussion into this order. To that discussion, the court adds that, as the officials seeking absolute immunity, the D.A. defendants bear "the burden of showing that such immunity is justified for the function[s] in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Upon review of the parties' respective papers, the court finds that the D.A. defendants have not met their burden with respect to any conduct before taking the case to the grand jury, and have met their burden with respect to some, but not all, conduct thereafter.

The D.A. defendants are not entitled to absolute immunity to the extent they participated in obtaining and executing the search warrants in January and March of 1992. They admit that defendant prosecutor Hall drafted the affidavits signed by Officer MacDonald of the Reno Police Department in support of the first search warrant, and that defendant prosecutor Coppa drafted the affidavit in support of the second search warrant. The D.A.'s office did not decide that it had probable cause to seek an indictment from a grand jury until months later. As the Supreme Court noted in *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993), "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Contrary to defendants' arguments, *Burns* does not hold that absolute immunity is available for a prosecutor's role in drafting affidavits in support of a search warrant. In *Burns*, the

Supreme Court went out of its way to limit the scope of its discussion to the prosecutor's participation in a probable cause hearing before the court. 500 U.S. 487-89. Moreover, it noted that the hearing occurred after arrest, which made it "connected with the initiation and conduct of a prosecution." *Id.* at 492.

Under the functional approach to absolute immunity required by *Buckley*, 509 U.S. at 2615, the D.A. defendants' roles in obtaining and executing the search warrants were analogous to providing legal advice to the police, which *Burns* held does not qualify for absolute immunity. 500 U.S. at 493. In *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986), the Supreme Court held that absolute immunity was not available for a police officer's application for a warrant. The same result obtains here to the prosecutors' role in helping police officers prepare applications for warrants. *See Kohl v. Casson*, 5 F.3d 1141, 1146 (8th Cir. 1993) (prosecutor absolutely immune for appearing with police officer before magistrate in hearing to obtain warrant, but only qualifiedly immune for advising officer on preparing affidavit).

On the other hand, the D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992. Courts generally have found prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. *Burns*, 500 U.S. at 490 n.6. Citing *Buckley*, plaintiffs argue that immunity is inappropriate here, though, because defendant Coppa lacked probable cause when he went before the grand jury and he used the grand jury as an investigative tool.

Plaintiffs' reliance on *Buckley* is misplaced. In *Buckley*, the prosecutors "convened a special grand jury for the sole purpose of investigating" a crime for which they had insufficient evidence to support anyone's arrest. 509 U.S. at 263-64.

> It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened its immediate purpose was to conduct a more thorough investigation of the crime--not to return and indictment against a suspect whom there was already probable cause to arrest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him.

Id. at 275. In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of materials and number of charges and defendants. Further, they are entitled to absolute immunity for any subsequent conduct on their part resulting in plaintiff Stanko's arrest because such conduct was in preparation "for the initiation of judicial proceedings" and occurred in the course of their roles as advocates for the state. *Buckley*, 509 U.S. at 273.

In an attempt to contravene the above, plaintiffs' request relief under Rule 56(f), but their request is inadequate. Under that rule,

> Should it appear from the affidavits of a party opposing [a motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make

such other order as it just.

Fed. R. Civ. P. 56(f). The Ninth Circuit has summarized the analysis of Rule 56(f) motions as follows:

> The party opposing summary judgment bears the burden of showing "what facts she hopes to discover to raise a material issue of fact." . . . The party seeking additional discovery also bears the burden of showing that the evidence sought exists. Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.

Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991) (citations omitted).

Counsel's affidavit claims, but does not support, that certain "documentation produced shows an ongoing investigation of new witnesses and new facts on or after July 8, 1992." #73 Dickerson Aff. He therefore "believes that there is a more than reasonable likelihood of generating, through additional discovery into facts after July 8, 1992, information which would be helpful on [the] issues of absolute and qualified immunity." *Id.* These averments fail to satisfy the above requirements. Moreover, the affidavits and exhibits submitted with the D.A. defendants' brief and reply brief strongly suggest that "the evidence sought [by plaintiffs] is almost certainly nonexistent or is the object of pure speculation." *Terrell*, 935 F.2d at 1018. *See also Schlesinger v. Central Intelligence Agency*, 591 F. Supp. 60, 64-65 (D.D.C. 1984) (Rule 56(f) application denied where mere allegation of factual dispute specifically rebutted by moving party's affidavit), *cited with approval, Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1476 (9th Cir. 1986). Additionally, inquiries

plaintiffs wish to pursue with respect to conduct after July 8, 1992, as expressed in their brief, #73 at 39, largely involve Coppa's subjective beliefs about the case when he took it before the grand jury; thus, they have little relevance to the absolute immunity issue.

Accordingly, plaintiffs' Rule 56(f) motion should be denied, as should plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." Plaintiffs' motion for partial summary judgment on the issue of absolute immunity should be granted in part and denied in part. The D.A. defendants, both prosecutors and investigators, are entitled to absolute immunity for their actions following July 8, 1992, with the exception, as they concede, that they are not entitled to absolute immunity for their allegedly defamatory, out-of-court statements concerning plaintiffs. Also, defendants have not adequately addressed plaintiffs' claims that defendants illegally retained property seized from plaintiffs, so defendants have not shown they are entitled to absolute immunity on those claims.

II. Qualified Immunity

The D.A. defendants move for summary judgment (#69) primarily on the grounds of qualified immunity. They contend qualified immunity shields them from liability on plaintiffs' § 1983 claims of individual and conspiratorial deprivations of constitutional rights (plaintiffs' first and fourth claims for relief). However, they do not move for summary judgment on plaintiffs' defamation claim. Plaintiffs oppose, objecting that discovery has not yet been completed and objecting to certain exhibits offered by defendants in support of their motion (#75).[1] Defendants reply

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[1] The court does not rely on defendants' exhibit #37, to which plaintiffs object, #75 at 12, and the court overrules

in support of the motion (#79).

"When a public official asserts qualified immunity from liability, the district court must determine whether, in light of clearly established principles governing the conduct in question, the official objectively could have believed that his conduct was lawful." *Osolinski v. Kane*, ___ F.3d ___, 1996 WL 450361, *2 (9th Cir. Aug. 12, 1996).

Concerning plaintiffs' claims that the D.A. defendants caused material misrepresentations and omissions to be made in the affidavits for search warrants, the law was clearly established that judicial deception may not be employed to obtain a warrant. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). However,

> a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can both establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant.

Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995). Upon an examination of both defendants' and plaintiffs' numerous exhibits, including those offered by plaintiffs in their papers addressing absolute immunity,[2] the court finds plaintiffs have

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plaintiff's other objections to defendants' exhibits, #75 at 10, 11, because those objections are without merit.

[2] It bears nothing that defendants' exhibit purporting to be the affidavit in support of the first search warrant, #69 Ex. 19, is missing several pages. However, the court has reviewed a complete copy of the affidavit offered by plaintiffs with their brief on absolute immunity. #73 Ex. 18

failed to raise a genuine issue of fact with respect to either of the two prongs identified in *Hervey*.

Likewise, plaintiffs' claim that the warrants were facially invalid because they were "general" warrants is belied by the warrants themselves.[3] Unlike warrants which the Ninth Circuit has found unconstitutionally overbroad, *e.g.*, *United States v. Kow*, 58 F.3d 423, 426-28 (9th Cir. 1995), these warrants describe the type of items to be seized with sufficient particularity, e.g., by limiting documents by time frame or by names of certain Champion employees and specifying a limited number of crimes for which evidence was sought. See #69 Ex. 20; #73 Ex. 22. Although the second warrant contained two fairly broad categories of items to be seized, these were only two of several more specific categories. In short, an "objectively reasonable" officer could have relied on either warrant. *Kow*, 58 F.3d at 428.

As to the remaining claims of constitutional violations before July 8, 1992, the D.A. defendants have demonstrated that reasonable officials objectively could have believed their conduct, to the extent plaintiffs have even shown any conduct by these defendants, was lawful. Excluded from the foregoing, of course, are plaintiffs' claims of defamation plus and illegal retention of seized property, which defendants do not address in their motion.

III. Failure to Train and Municipal Liability

Defendants Holmes and Coppa move for summary judgment (#69) on plaintiffs' claim of § 1983 liability for failure

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[3] Again, defendants submit an incomplete copy of the second search warrant, #69 Ex. 34; however, the court has reviewed a complete copy submitted with plaintiffs' brief on absolute immunity. #73 Ex. 22.

to train. Defendant Washoe County moves for summary judgment on plaintiffs' claim of municipal liability under § 1983 (#51). Plaintiffs oppose (#71), and Washoe County replies (#74). Holmes and Coppa join Washoe County's reply. #79 at 24.

Defendants are liable under § 1983 for failure to train "only where the failure to train amounts to deliberate indifference to the rights of persons with whom [the subordinates] come into contact." *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991) (quoting *City of Canton v. Harris*, 489 U.S. 378 (1989)). By affidavits offered with its motion, Washoe County has established that all of the individuals had adequate training. The alleged inadequacies complained of by plaintiffs are insufficient to show that defendants "made a 'deliberate' or conscious' choice not to train" subordinates in areas they knew "would 'likely . . . result in the violation of constitutional rights.'" *Ting*, 927 F.2d at 1512 (quoting *Harris*).

Similarly, plaintiffs fail to support their claim that Washoe County, through Holmes and Coppa, sanctioned or ratified constitutional violations. Plaintiffs have not raised a genuine issue under state law that Assistant District Attorney Coppa was a final policymaking county official with respect to grand jury practice. *See Pembaur v. Cincinnati*, 475 U.S. 469, 482-83 (1986). Nor have they raised a genuine issue that District Attorney Holmes directly participated in any of the alleged constitutional deprivations or that her alleged ratification of any actions by subordinates caused those deprivations.

Thus, plaintiffs have failed to raise a genuine issue with respect to failure to train and municipal liability. Again, however, defendants have not addressed the defamation plus claims and illegal retention of seized property claims. Plaintiffs have alleged that defendants Holmes and Coppa were official policymakers for Washoe County. #5 ¶ XII. Hence, it is possible that Washoe County may be liable for their acts of defamation.

See Pembaur, 475 U.S. at 481. Because the parties have not briefed this issue with respect to defamation plus and retention of seized property, it would be inappropriate to summarily adjudicate the issue.

IV. Conclusion

Regarding plaintiffs' first and fourth claims for relief, defendants have shown that they are entitled to absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, and entitled to qualified immunity on plaintiffs' § 1983 claims before that date, except for plaintiffs' claims of defamation plus and retention of siezed property. Defendants also have shown there is no genuine issue of material fact regarding plaintiffs' second claim for relief--for failure to train and municipal liability--except, again, for the defamation plus and retention of seized property claims. Defendants have asserted, and plaintiffs have not controverted, that plaintiffs' third claim for relief--seeking injunctive and declaratory relief--is moot because all property has been returned to plaintiffs and there is no ongoing criminal proceeding. With regard to the state-law causes of action, the court finds it inappropriate to make a summary adjudication of those claims based on the very limited briefing by the parties.

Accordingly, **IT IS HEREBY ORDERED** that defendant Washoe County's motion for summary judgment (#51) is GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that the remaining defendants' motions for summary judgment (#s 67 & 69) are GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (#73) is GRANTED IN PART AND DENIED IN PART consistent with the above order; plaintiffs' Rule 56(f) request (#73) is DENIED; and plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)" (#73) is DENIED.

DATED: This 26th day of August, 1996.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JERRY VAN DER HOEVEN, et al., CV-N-95-90-DWH

Plaintiffs,

vs. **ORDER**

DONALD COPPA, et al.,

Defendants

_____/

Before the court are the parties' papers on the following matters: the City defendants' motion for entry of judgment (#36, 39, 41); the issue of absolute immunity (#s 42, 47, 51, 52); Washoe County's motion for summary judgment (#s 43, 44, 48); and the D.A. defendants' motion for summary judgment (#s 43A, 50, 53). No oral argument was requested, and, due to the extensive briefing, the court finds oral argument unnecessary.

BACKGROUND

In an order entered February 26, 1996 (#33), the court dismissed some of plaintiffs' claims on statute of limitations grounds. The court hereby incorporates the description of plaintiffs' factual allegations and claims from that order into this one. In that order, the court held that any claims which accrued before February 10, 1993, were barred. Specifically, plaintiffs' claims of illegal search and seizure and defamatory press releases connected with the searches in January and March of 1992 were barred. Not necessarily barred from the face of the complaint were claims of alleged defamation to business relations and wrongful retention of property. Finally, not barred were federal

claims of illegal arrest and prosecution and related defamation, as well as state claims of malicious prosecution, abuse of process, false arrest, and false imprisonment.

ANALYSIS

I. Absolute Immunity--D.A. Defendants

As described more fully in the court's order entered March 6, 1996 (#35), the procedural posture of this case led the court to order the parties to brief it on the issue of absolute immunity. The D.A. defendants complied with that order (#42), contending, in a nutshell, that the prosecutors are absolutely immune from all of plaintiffs' claims except for defamation and failure to train, and that the investigators are absolutely immune to the same extent from July 8, 1992--the date the grand jury was impanelled--to the present. Plaintiffs responded by moving for partial summary judgment in their favor on the issue of absolute immunity (#47). Alternatively, they requested additional discovery pursuant to Federal Rule of Civil Procedure 56(f) prior to the court's ruling on absolute immunity. Additionally, plaintiffs requested that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." #47 at 2. This request refers to a motion (#36) in the related case CV-N-94-33-DWH. Defendants then replied (#51, supplemented by #52), which closed the briefing on this issue.

The court set forth the principles of absolute immunity as applied to prosecutors and investigators in its order of March 6, 1996 (#35), and hereby incorporates that discussion into this order. To that discussion, the court adds that, as the officials seeking absolute immunity, the D.A. defendants bear "the burden of showing that such immunity is justified for the function[s] in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Upon review of the parties' respective papers, the court finds that the

D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992.[1]

Courts generally have found prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. *Burns*, 500 U.S. at 490 n.6. Citing *Buckley*, plaintiffs argue that immunity is inappropriate here, though, because defendant Coppa lacked probable cause when he went before the grand jury and he used the grand jury as an investigative tool.

Plaintiffs' reliance on *Buckley* is misplaced. In *Buckley*, the prosecutors "convened a special grand jury for the sole purpose of investigating" a crime for which they had insufficient evidence to support anyone's arrest. 509 U.S. at 263-64.

> It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime--not to return an indictment against a suspect whom there was already probable cause to arest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him.

Id. at 275. In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing

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[1] As stated above, plaintiff's claims based on conduct before that time have been ruled barred by the statute of limitations.

evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of materials and number of charges and defendants. Further, they are entitled to absolute immunity for any subsequent conduct on their part resulting in plaintiffs' arrests because such conduct was in preparation "for the initiation of judicial proceedings" and occurred in the course of their roles as advocates for the state. *Buckley*, 509 U.S. at 273.

In an attempt to contravene the above, plaintiffs' request relief under Rule 56(f), but their request is inadequate. Under that rule,

> Should it appear from the affidavits of a party opposing [a motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). The Ninth Circuit has summarized the analysis of Rule 56(f) motions as follows:

> The party opposing summary judgment bears the burden of showing "what facts she hopes to discover to raise a material issue of fact." . . . The party seeking additional discovery also bears the burden of showing that the evidence sought exists. Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.

Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991) (citations omitted).

Counsel's affidavit claims, but does not support, that certain "documentation produced shows an ongoing investigation of new witnesses and new facts on or after July 8, 1992." #47 Dickerson Aff. He therefore "believes that there is a more than reasonable likelihood of generating, through additional discovery into facts after July 8, 1992, information which would be helpful on [the] issues of absolute and qualified immunity." *Id.* These averments fail to satisfy the above requirements. Moreover, the affidavits and exhibits submitted with the D.A defendants' brief and reply brief strongly suggest that "the evidence sought [by plaintiffs] is almost certainly nonexistent or is the object of pure speculation." *Terrell*, 935 F.2d at 1018. *See also Schlesinger v. Central Intelligence Agency*, 591 F. Supp. 60, 64-65 (D.D.C. 1984) (Rule 56(f) application denied where mere allegation of factual dispute specifically rebutted by moving party's affidavit), *cited with approval*, *Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1476 (9th Cir. 1986). Additionally, inquiries plaintiffs wish to pursue with respect to conduct after July 8, 1992, as expressed in their brief, # 47 at 39, largely involve Coppa's subjective beliefs about the case when he took it before the grand jury; thus, they have little relevance to the absolute immunity issue.

Accordingly, plaintiffs' Rule 56(f) motion should be denied, as should plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." Plaintiffs' motion for partial summary judgment on the issue of absolute immunity should be granted in part and denied in part. The D.A. defendants, both prosecutors and investigators, are entitled to absolute immunity for their actions following July 8, 1992, with the exception, as they concede, that

they are not entitled to absolute immunity for their defamatory, out-of-court statements concerning plaintiffs. Also, defendants have not adequately addressed plaintiffs' claims that defendants illegally retained property seized from plaintiffs, so defendants have not shown they are entitled to absolute immunity on those claims.

II. Qualified Immunity--D.A. Defendants

The D.A. defendants move for summary judgment (#43A) primarily on the grounds of qualified immunity. They contend qualified immunity shields them from liability on plaintiffs' § 1983 claims of individual and conspiratorial deprivations of constitutional rights (plaintiffs' first and third claims for relief). Due to the above disposition of the absolute immunity issue, it is unnecessary for the court to consider qualified immunity for the claims that survived the statute of limitations dismissal. Again, however, defendants' do not address plaintiffs' claims of defamation plus and illegal retention of seized property, so they have not shown an entitlement to immunity on those claims.

III. Failure to Train and Municipal Liability

Defendants Holmes and Coppa move for summary judgment (#43A) on plaintiffs' claim of § 1983 liability for failure to train. Defendant Washoe County moves for summary judgment on plaintiffs' claim of municipal liability under § 1983 (#43). Plaintiffs oppose (#44), and Washoe County replies (#48). Holmes and Coppa join Washoe County's reply. #53 at 8.

Defendants are liable under § 1983 for failure to train "only where the failure to train amounts to deliberate indifference to the rights of persons with whom [the subordinates] come into contact." *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991) (quoting *City of Canton v. Harris*,

489 U.S. 378 (1989)). By affidavits offered with its motion, Washoe County has established that all of the individuals had adequate training. The alleged inadequacies complained of by plaintiffs are insufficient to show that defendants "made a 'deliberate' or conscious' choice not to train" subordinates in areas they knew "would 'likely. . . . result in the violation of constitutional rights.'" *Ting*, 927 F.2d at 1512 (quoting *Harris*).

Similarly, plaintiffs fail to support their claim that Washoe County, through Holmes and Coppa, sanctioned or ratified constitutional violations. Plaintiffs have not raised a genuine issue under state law that Assistant District Attorney Coppa was a final policymaking county official with respect to grand jury practice. *See Pembaur v. Cincinnati*, 475 U.S. 469, 482-83 (1986). Nor have they raised a genuine issue that District Attorney Holmes directly participated in any of the alleged constitutional deprivations or that her alleged ratification of any actions by subordinates caused those deprivations.

Thus, plaintiffs have failed to raise a genuine issue with respect to failure to train and municipal liability. Again, however, defendants have not addressed the defamation plus claims or the claim that defendants illegally retained seized property. Plaintiffs have alleged that defendants Holmes and Coppa were official policymakers for Washoe County. #1 ¶ X. Hence, it is possible that Washoe County may be liable for their acts of defamation. *See Pembaur*, 475 U.S. at 481. Because the parties have not briefed this issue with respect to defamation plus or retention of seized property, it would be inappropriate to summarily adjudicate the issue.

IV. City Defendants' Motion for Entry of Judgment

The City defendants move for entry of judgment in their favor pursuant to Federal Rule of Civil Procedure 54(b) (#36). They contend the court's order entered February 26, 1996,

effectively disposed of all of plaintiffs' claims against them and that "all parties would benefit from the formal entry of judgment . . . ." #36 at 3. Plaintiffs oppose, contending that theories of joint activity and conspiracy, as well as the possibility that future discovery "may uncover facts supporting additional claims for relief against the City defendants . . . ," #39 at 4, make entry of judgment inappropriate. The City defendants' reply (#48) closes the briefing on the motion.

For reasons other than those offered by plaintiffs, the court agrees that it would be inappropriate to direct the entry of final judgment in favor of the City defendants. Under rule 54(b),

> [w]hen more than one claim for relief is presented in any action, . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay . . . .

Fed. R. Civ. P. 54(b). A decision is final and therefore appealable "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'" as to that party or claim. *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991) (citation omitted). The court's dismissal of certain claims based on the statute of limitations did not necessarily end the litigation as to the City defendants. By the order entered February 26, 1996, the court did not adjudicate plaintiffs' possible § 1983 claims that accrued after February 10, 1993, against these or any defendants. Moreover, although the court noted that plaintiffs state-law claims "lie, if at all, against only the D.A. defendants and perhaps the County," #33 at 8, that statement was not a holding dismissing those claims against the City defendants because the statute of limitations was the only issue properly before the court. In short, the City defendants have

not challenged any claims not barred by the statute of limitations; hence, they are not entitled to judgment on such claims.

Further, the complexity and confusing nature of plaintiffs' complaint counsels against a Rule 54(b) order. Rule 54(b) certification is proper "if it will aid expeditious decision of the case" and "prevent piecemeal appeals." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (citation omitted). Here, the claims against the City defendants are not easily severable from the claims against the other defendants, and, at this stage of the litigation, the possibility of piecemeal appeals appears great.

Accordingly, the motion for entry of judgment will be denied.

V. Conclusion

Regarding plaintiffs' first and third claims for relief, the D.A. defendants have shown that they are entitled to absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, except for plaintiffs' claims of defamation plus and retention of seized property. Defendants also have shown there is no genuine issue of material fact regarding plaintiffs' second claim for relief--for failure to train and municipal liability--except, again, for the defamation plus and retention of seized property claims. With regard to the state-law causes of action, the court finds it inappropriate to make a summary adjudication of those claims based on the very limited briefing by the parties. Finally, the City defendants have not shown they are entitled to entry of judgment under Rule 54(b).

Accordingly, **IT IS HEREBY ORDERED** that defendant Washoe County's motion for summary judgment (#43) is GRANTED IN PART AND DENIED IN PART

consistent with the above order.

IT IS FURTHER ORDERED that the D.A. defendants' motions for summary judgment (#s 43 & 43A) are GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (#47) is GRANTED IN PART AND DENIED IN PART consistent with the above order; plaintiffs' Rule 56(f) request (#47) is DENIED; and plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)" (#47) is DENIED.

IT IS FURTHER ORDERED that the City defendants' motion for entry of judgment (#36) is DENIED.,

DATED: This 26th day of August, 1996.

/s/
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 99-52

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, *et al.*,

Petitioners,

v.

DOROTHY NASH-HOLMES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a prosecutor who has decided to seek an indictment is protected by absolute immunity for presenting evidence to a grand jury after an extensive investigation has been completed and based on an objectively reasonable belief that there was probable cause to arrest the indicted defendants.

II. Whether granting and upholding summary judgment violates the Seventh Amendment and whether Petitioners can raise that argument for the first time in their Petition for Review.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt Petitioners' Constitutional Provisions and Statutes Involved, with the exception, as discussed herein, that issues raised for the first time by Petitioners regarding the Seventh Amendment are not properly before this Court.

STATEMENT OF THE CASE

A. Procedural History

In July of 1993, the Washoe County Nevada Grand Jury issued an indictment against John P. Stanko ("Stanko"), the owner of a Reno Chevrolet dealership, the dealership itself, Hallman Chevrolet ("Dealership"), and fifteen dealership employees ("Salesmen"). In May of 1994, a state court judge dismissed all charges with prejudice.

In January of 1994, before the dismissal of the criminal charges, Stanko and the Dealership filed a civil rights claim against Washoe County, the Washoe County District Attorney, two Assistant District Attorneys, and three investigators employed by the District Attorney ("D.A. Defendants"). In February of 1995, the Salesmen filed a similar lawsuit against all but one of the Defendants named in the Dealership lawsuit.

The D.A. Defendants filed motions to dismiss in both cases. HD 10, SD 20[1]. In the Dealership Case, the Court

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1. HD refers to the district court's docket sheet in the Hallman case. SD refers to the district court's docket sheet in the Salesman (Cont'd)

denied the motion to dismiss and ruled that to the extent the D.A. Defendants sought summary judgment, their motion was premature and would be denied without prejudice. HD 29. In the Salesmen Case, the Defendants moved for a partial Motion to Dismiss on statute of limitations grounds. SD 20. The Court ruled that the two-year statute of limitation barred the Salesmen from pursuing any claims based on actions that arose before February of 1993. SD 33. The Salesmen did not appeal that Order.

In March of 1996, the D.A. Defendants moved for summary judgment in both cases based on qualified immunity and absolute immunity. On August 28, 1996, District Court Judge David Hagen granted partial summary judgment in both cases based on qualified and absolute immunity. Pet. App. 25 (*Hallman* Order); App. 37 (*Van Der Hoeven* Order). With regard to qualified immunity, the district court found that the D.A. Defendants acted in an objectively reasonable manner and were protected by qualified immunity for their actions in investigating the crimes. *See* Pet. App. 33. With regard to absolute immunity, the district court found that the D.A. Defendants were absolutely immune for their respective roles in presenting evidence to the Grand Jury after the decision had been made to seek an indictment. *See* Pet. App. 28 (*Hallman*); App. 39-40 (*Van Der Hoeven*). Plaintiffs moved for reconsideration, which the district court denied. HD 105; SD 78.

The district court entered final judgment on January 13, 1997 and Plaintiffs (Petitioners herein) appealed to the United States Court of Appeals for the Ninth Circuit. After briefing

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(Cont'd)
case. ER refers to the excerpt of record filed by Plaintiffs/Appellants in the Ninth Circuit Court of Appeals. SER refers to the Supplemental Excerpt of Record filed by the Defendants/ Respondents in the Ninth Circuit Court of Appeals.

and oral argument, the Ninth Circuit affirmed the district court's granting of partial summary judgment based on qualified and absolute immunity.[2] Pet. App. 13-16; 169 F.3d 636, 643-44 (9th Cir. 1999). Plaintiffs/Appellants moved for reconsideration and for hearing *en banc*. Both were denied. Pet. App. 21. They then filed this Petition for Writ of Certiorari.

B. Statement Of Facts

The district court and the Ninth Circuit Court reviewed hundreds of pages of exhibits in reaching their respective decisions awarding the D.A. Defendants the protection of qualified and absolute immunity. The great majority of those exhibits were documents that the D.A. Defendants gathered in their exhaustive, year long, investigation before deciding to seek a grand jury indictment. Other documents included deposition transcripts of key witnesses and other discovery obtained in the federal court proceedings. Thus, both the district court and the appellate court judges had, and took, the opportunity to view for themselves the actual evidence gathered by the D.A. Defendants during the investigation phase of the underlying proceedings. The district court, after exhaustively reviewing those documents, found that the D.A. Defendants were entitled to qualified and absolute immunity as a matter of law. The Ninth Circuit, in its opinion filed in this matter, demonstrated that it also carefully reviewed the voluminous evidence that was gathered by the D.A. Defendants during their investigation.

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2. Another issue on appeal to the Ninth Circuit was the district court's granting of attorney's fees to the D.A. Defendants. The Ninth Circuit reversed the district court's determination on that issue. The D.A. Defendants have sought review by this Court of the Ninth Circuit's reversal of an attorney's fees award to the D.A. Defendants in their Conditional Cross-Petition filed contemporaneously with this Opposition.

Instead of reiterating those facts at length herein, Respondents defer to, adopt, and incorporate the portion of the Ninth Circuit's decision that describes those undisputed facts in detail. *See* Pet. App. 5-9; 169 F.3d at 639-42.

In sum, there were two phases to the underlying criminal investigation and prosecution of the Dealership and Salesmen. The first phase was the investigation phase, which began with the sworn criminal complaint of victim Rick Wells. During the investigation phase, the investigators interviewed hundreds of witnesses, including several current and former Dealership employees, some of whom became confidential witnesses. The investigators reviewed in excess of 1,800 sales transaction files. They gathered thousands of pages of documents. When their investigation was complete, and with the help of a police detective who had been heavily involved in the investigation, the investigators drafted a comprehensive report detailing the investigation from the initial Wells transaction to the date of completion of the report. The report summarized the entire case, including all evidence, victims, witnesses, suspects, and other information the investigators had uncovered in their nearly year-long investigation.

The next phase of the proceedings was the indictment phase. The Chief Deputy District Attorney undertook a thorough review of the report and of the evidence gathered over the year-long investigation phase. SER 39-44 (Coppa Affidavit); SER 89-92 (Coppa Supplemental Affidavit). Based upon Coppa's experience with the investigation and his subsequent review of all of the information gathered in the investigation, Coppa determined that in his professional opinion there was probable cause to believe that salesmen, management level employees, the dealership, and its owner,

John Stanko, had engaged in fraudulent practices and indictable offenses. SER 44. Due to the breadth of the investigation, the number of victims, the number of prospective witnesses, and the number of defendants, Coppa decided to present the evidence to the Washoe County Grand Jury for an indictment instead of filing a complaint and taking the case to a preliminary hearing. *Id.*

Coppa began presenting evidence to the Grand Jury on July 8, 1992, thereby officially beginning the indictment phase of the criminal case. In twenty Grand Jury sessions conducted over the following year, the Grand Jury took testimony from 77 witnesses. *See* SER 72-75 (Long Supplemental Affidavit). Approximately 50 of the 77 witnesses were Hallman customers. SER 74. Many testified to transactions in which they either did not know of, or received no credit for, rebates to which they were entitled. SER 197 (Landes Affidavit). Other customers testified that they were sold extended warranties that they either expressly declined or were never notified of. *Id.* Yet others testified to being steered into lease transactions wherein they were not credited for down payments, trade-ins, or rebates. *Id.*

It took nearly a year for Coppa to present to the Grand Jury all of the evidence uncovered in the investigation phase. By August 26, 1992, the Grand Jury had taken testimony from 77 witnesses, had received over 140 exhibits, and had accumulated over 3,200 pages of documents and transcripts. SER 53 (Landes Affidavit 3/27/96); SER 72-88 (Long Supplemental Affidavit 4/22/96). On July 2, 1993, the Grand Jury indicted seventeen Defendants from Hallman, including the dealership itself and John Stanko, its owner, in an eighty-one count indictment. *See* RE 166 (State Court Order). After

obtaining the indictment, Coppa presented the indictment to a state court judge who issued arrest warrants for the indicted defendants and set the trial for May of 1994.

Before trial, the indicted defendants moved to dismiss the indictment. In those proceedings, a Deputy District Attorney, Gary Hatlestad, who had not been involved in the investigation or the presentation of evidence to the Grand Jury, voluntarily dismissed a number of the charges. SER 280-81 (Hatlestad Affidavit). This was because Hatlestad believed the Chief Deputy District Attorney had made a fundamental pleading error in drafting the indictment by failing to identify conduct which would cause an accessory to be responsible as a principal. *See* SER 280-81 (Hatlestad Affidavit). Thus, when A.D.A. Hatlestad reviewed the indictment after it had been filed, he concluded there had been pleading errors with respect to a number of charges. *Id.* Therefore, in court, Hatlestad agreed to dismiss the charges against the indicted Defendants that contained this pleading error. *Id.* But he did not dismiss the charges for those counts against the principals who were believed to have been directly responsible for the crime. *Id.* As Hatlestad told the state court, "[t]here wouldn't be these problems if Mr. Coppa charged the case right." *Id.* He stated that his decision to move to dismiss those charges without prejudice "was based solely on the belief that the counts were not, *as pleaded*, supported by slight or marginal evidence as that phrase is defined under the law." *Id.* (emphasis added). Hatlestad went on to explain that:

> Your affiant has never asserted (nor do I believe) that the Grand Jury proceedings . . . taken as a whole, failed to reveal evidence that these alleged criminal defendants committed no crimes; indeed, given the slight or marginal evidence standard [of

> Nevada law], your affiant believes sufficient evidence was presented to the Grand Jury for it to conclude that each of the named defendants did commit crimes under Nevada law; by the same token, your affiant is informed and does believe that an arresting officer, acting either with or without an arrest warrant, would have had probable cause to believe that each of the named defendants had committed crimes under Nevada law and could have arrested them accordingly.

SER 280-81.

After the District Attorney's office voluntarily agreed to dismiss the defective charges, the indicted Defendants continued to attack the remaining charges. State Court Judge Whitehead agreed with many of the indicted Defendants' arguments. In a lengthy decision, Judge Whitehead dismissed the remainder of the charges with prejudice based on what he found was prosecutorial misconduct and state law violations. RE 166-338.

The District Attorney appealed Judge Whitehead's decision to the Nevada Supreme Court. However, the newly elected District Attorney dismissed the appeal before it was heard. In the meantime, Plaintiffs had already begun prosecuting their § 1983 claims against respondents herein.

REASONS FOR DENYING THE WRIT

I.

THE LAW IS CLEAR THAT ABSOLUTE IMMUNITY PROTECTS A PROSECUTOR FOR HIS ACTIONS IN PRESENTING EVIDENCE TO A GRAND JURY AFTER HE DECIDES TO SEEK AN INDICTMENT BASED ON AN OBJECTIVELY REASONABLE DETERMINATION OF PROBABLE CAUSE.

The primary issue in this case is whether the D.A. Defendants are immune from suit for their activities in presenting evidence to a grand jury after a decision had been made to seek an indictment. The present rule of law on this issue, as most recently spelled out in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) is clear and unambiguous: a prosecutor is protected by absolute immunity for his actions in presenting evidence to a grand jury to seek an indictment. 509 U.S. at 273.

This Court has adopted a "function test" to determine if a prosecutor is entitled to the protection of absolute immunity. *See Buckley*, 509 U.S. at 269. To determine if absolute immunity applies to a given situation, the court looks to the nature of the function that is being performed, as opposed to the identity of who is performing it. *Id.* (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Thus, the Court has recognized the difference between an advocate's evaluation of evidence and interviewing of witnesses as he prepares for trial, and a detective's role in searching for clues and corroboration in support of an arrest. *Id.* at 273.

As this Court stated in *Buckley*, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity." *Id.* The Court clarified its holding by noting that those acts that fall within the protection of absolute immunity "must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.*; *see also Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (stating that "in initiating a prosecution and in presenting the State's case, the prosecution is immune from a civil suit for damages under § 1983).[3]

The rule that a prosecutor is immune from suit for his actions before a grand jury is not a new one. *See Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1975) (discussing history of doctrine now identified as absolute prosecutorial immunity). The first American case to discuss a prosecutor's amenability to suit for his role in initiating a criminal prosecution was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896). *See Imbler*, 424 U.S. at 421. There, a plaintiff charged that the prosecutor maliciously added a plaintiff's name to a grand jury true bill without probable cause after the grand jury refused to indict him. *Id.* The Indiana Supreme Court dismissed the case, finding that a prosecutor was absolutely immune from prosecution of such a claim. *Id.* (citing *Griffith*, 44 N.E. at 1002). That view became the law of the land. *Id.* at 422.

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3. Although the *Buckley* court was divided in its decision in that case based on the facts of the case, both the majority and the dissent agreed with this statement of the law with respect to absolute immunity.

This Court first addressed the issue of prosecutorial immunity for actions before a grand jury in *Yaselli v. Goff*, 275 U.S. 503 (1927). In *Yaselli*, plaintiff sued the Special Assistant to the Attorney General of the United States, alleging that the prosecutor procured the plaintiff's grand jury indictment by the willful introduction to the grand jury of false and misleading evidence. *Yaselli v. Goff*, 12 F.2d 396, (1926). The Second Circuit found that the prosecutor was protected by absolute immunity and this Court affirmed. 275 U.S. 503 (1927).

The modern day analysis of absolute immunity under § 1983 began with *Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1975). In *Imbler*, plaintiff claimed that a prosecutor conspired to unlawfully charge and convict plaintiff by allowing false evidence at trial and while having knowledge that Imbler was actually innocent. *Id.* at 415-16. The Court reviewed the history of absolute prosecutorial immunity as it developed in common law. *Id.* at 421-25. The Court then ruled that the same immunity should apply to claims under § 1983. *Id.* at 427. Thus, the Court held that "in initiating a prosecution and presenting the State's case, the prosecutor is immune from civil suit for damages under § 1983." *Id.* at 431. This Court has used several cases since *Imbler* to define the boundaries of that holding.

In *Malley v. Briggs*, 475 U.S. 335 (1986), a police officer asserted a defense of absolute immunity for his alleged role in applying for arrest warrants. 475 U.S. at 339. The officer analogized his role in applying for arrest warrants to a prosecutor's role in asking a grand jury to indict. *Id.* at 341-42. The Court rejected the analogy, and found that the officer was not protected by absolute immunity. *Id.* at 343. In doing so, the Court discussed why a prosecutor is immune for his actions in seeking an indictment from a grand jury:

> Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Id.

Buckley v. Fitzsimmons, 509 U.S. 259 (1993), stands as the definitive modern ruling on absolute immunity. In *Buckley*, the plaintiff claimed that the prosecutor violated § 1983 by making false statements at a press conference and by fabricating evidence during a preliminary investigation of a crime. This Court, noting that the principles applied to determine the scope of immunity for state officials under § 1983 "are by now familiar," discussed the history of absolute immunity and its application to § 1983. 500 U.S. at 267-68.

The Court reiterated that it uses a functional approach in determining the confines of absolute immunity protection, and discussed previous cases where it applied that functional test. *Id.* at 270-71 (discussing *Imbler*, *supra* and *Burns v. Reed*, 500 U.S. 478 (1991)). The Court noted that in *Burns v. Reed*, 500 U.S. 478 (1991), it found that the prosecutor's acts of giving legal advice to the police were not completed in his role as an advocate for the state, and were not "intimately associated with the judicial phase of a criminal proceeding." *Id.* at 271. Thus, those activities were not protected by absolute immunity. *Id.* As the Court noted, "a

prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* at 273 (citing *Burns*).

However, this Court went on to clarify its previous rulings in a statement that is central to the dismissal of plaintiffs' claims in this case, stating:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of criminal proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Id.

In 1997, this Court was presented with the issue of whether a prosecutor is absolutely immune for her role in making false statements in an affidavit for an application for an arrest warrant where the prosecutor swore to the truth of those statements. *See Kalina v. Fletcher*, 522 U.S. 118 (1997). The Court found that by swearing to the truth of the statements, the prosecutor was acting in the role of a complaining witness, and not as an advocate for the state in a proceeding intimately associated with the judicial process. *Id.* at 509-10. Therefore, this Court found that she was not absolutely immune for those acts. *Id.* at 510. However, the

Court confirmed its position with regard to actions taken before a grand jury and its holdings in *Burns* and *Malley* where the Court discussed that a prosecutor is absolutely immune for his actions in seeking an indictment from a grand jury. *Id.* at 508 (discussing that in *Burns*, after noting a "consensus among the Courts of Appeals concerning prosecutorial conduct before Grand Juries," the court granted the same absolute immunity protection for appearing in court at a probable cause hearing); *Id.* at 506-06 (discussing *Malley*, wherein the court acknowledged that a prosecutor was protected by absolute immunity for seeking an indictment from the Grand Jury).

Thus, it is the clear and unambiguous law of the land that a prosecutor who presents evidence to a Grand Jury in order to seek an indictment is protected from suit by absolute prosecutorial immunity. Presenting evidence to a Grand Jury for indictment is unquestionably the function of a prosecutor, and only a prosecutor. Further, the process of presenting evidence to a Grand Jury to seek an indictment is intimately associated with the judicial process. Therefore, those actions fall well within the confines of absolute prosecutorial immunity.

II.

THE LOWER COURTS UNDERSTOOD, PROPERLY CITED, AND CORRECTLY APPLIED THIS COURT'S DECISIONS ON ABSOLUTE IMMUNITY TO THE UNDISPUTED FACTS OF THIS CASE.

As discussed above, the D.A. Defendants began presenting evidence to the Grand Jury only after a nearly year-long investigation led the Chief Deputy District Attorney to conclude that there was probable cause to arrest

the indicted defendants. Because of the enormous volume of documentation, and because of the large number of witnesses, the Chief Deputy District Attorney made the decision to seek an indictment through use of the grand jury. He presented the evidence over a one year period and, when he had finished the presentation of the evidence gathered in the investigation phase, the grand jury issued its indictments. Based on the grand jury indictments, a state court judge then issued arrest warrants for the indicted defendants.

Based on the well-established law of absolute immunity, the D.A. Defendants moved for summary judgment based on absolute immunity for all actions taken by them with regard to presenting evidence to the Grand Jury. The district court, after full briefing and after the submission of hundreds of pages of evidence (most of which was the evidence gathered by the investigators during the investigation phase of the state court criminal proceedings) agreed that those activities taken by the D.A. Defendants during the indictment phase were protected by absolute prosecutorial immunity. The district court found that "the D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992." *Hallman* Order dated Aug. 26, 1996 (Pet. App. 28); *See also Van Der Hoeven* Order dated Aug. 26, 1996 (Pet. App. 38-39). The plaintiffs moved for reconsideration, making the same arguments that they would later make to the Ninth Circuit Court of Appeals. The district court denied the motions for reconsideration, HD 105; SD 78.

Plaintiffs then appealed to the Ninth Circuit Court of Appeals. However, a unanimous panel of the Ninth Circuit Court of Appeals agreed with the district court, finding that because

the D.A. defendants "functioned as advocates in the grand jury proceedings," they were entitled to absolute immunity for their roles in those proceedings. Pet. App. 13-14; 169 F.3d at 643. Plaintiffs moved for reconsideration and for hearing *en banc* at the Ninth Circuit. Both motions were denied. Pet. App. 23.

Plaintiffs argued in the district court, at the appeals court, and as they do now, that there is an exception to the general rule of absolute immunity that applies in this case based on the specific facts of this case. The argument is based on dicta from *Buckley* where this Court distinguished between a grand jury that was used to seek indictment and a grand jury that was used solely for a preliminary investigation of an unsolved crime. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-75 (1993). Therein, this Court, in explaining why the prosecutor's actions were investigatory in nature (and therefore were not protected by absolute immunity), stated that:

> A prosecutor neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested. It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime — not to return an indictment against a suspect whom there was already probable cause to arrest. . . . Under these circumstances, the prosecutor's conduct occurred well before they could properly claim to be acting as advocates.

Id. at 274-75. Relying on that language, Plaintiffs have repeatedly made two arguments that absolute immunity does

not protect the D.A. Defendants in this specific case: (1) there was no probable cause to arrest plaintiffs at the time the D.A. Defendants began presenting evidence to the grand jury; and (2) the grand jury was used solely as a preliminary investigation of an unsolved crime, not in order to seek an indictment. However, the district court and the Ninth Circuit Court, after a careful review of the record in this matter, properly rejected those fact-based arguments.

In dismissing Plaintiffs' claims at the trial level, the district court specifically acknowledged Plaintiffs' claims that the D.A. Defendants lacked probable cause when they went before the grand jury and the grand jury was used as an "investigative tool." Pet. App. 28. The district court responded to those arguments as follows:

> In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of charges and defendants.

Pet. App. 29. That determination was based on a review by the court of hundreds of pages of exhibits and documentary evidence that showed what took place during the investigation phase of the criminal proceedings as well as sworn deposition testimony of the Chief Deputy District Attorney who made the decision to seek an indictment from the Grand Jury.

The plaintiffs moved for reconsideration of the district court's decision, arguing that the district court did not thoroughly analyze plaintiffs' arguments and exhibits. *See* Order dated November 7, 1996. HD 105; SD 78. The district court denied the motions, however, finding that it was "neither timely nor well-founded." *Id.*

After being denied their motions for reconsideration in the trial court, Plaintiffs appealed to the Ninth Circuit Court of Appeals. There, they reiterated the same arguments, as well as argued that the district court's entry of summary judgment based on immunities was improper because there remained disputed issues of material fact. The Ninth Circuit reviewed the district court's decisions regarding immunities *de novo*. 169 F.3d at 642, Pet. App. 10. The Ninth Circuit also carefully reviewed the myriad exhibits and documentary evidence upon which the lower court's decisions were based. Based upon that *de novo* review, and properly citing the relevant controlling United States Supreme Court decisions, the Ninth Circuit first addressed the issue of whether the grand jury was simply an investigatory tool. It rejected that argument, holding that:

> [t]he Washoe prosecutors functioned as advocates in the grand jury proceedings. By the time the grand jury was impaneled, the Washoe prosecutors had completed a vast majority of the investigation and, prior to the impanelment, virtually every witness had been interviewed and every exhibit compiled.

Pet. App. 13-14; 169 F.3d at 643.

The court then turned to plaintiffs' arguments that the D.A. Defendants did not have probable cause when they began the grand jury phase. After detailing the facts of the entire investigation that occurred before the grand jury proceedings, the Ninth Circuit Court held that:

> In the present case, the Washoe prosecutors had probable cause exceeding that recognized in *Boueri*. After a year-long investigation, the Washoe prosecutors had compiled hundreds of supporting documents and interviewed dozens of witnesses, including former employees and customers. As a result of this investigation, the Washoe prosecutors had ample and convincing evidence that Hallman Chevrolet employees had forged customers' signatures, withheld rebates, retained customer down-payments intended to reduce principal balances and made material misrepresentations to customers.

Pet. App. 15; 169 F.3d at 644. Thus, the appeals court affirmed the district court's grant of summary judgment based on absolute immunity.

The Ninth Circuit also directly addressed Plaintiffs' arguments regarding the voluntary dismissal of many of the criminal charges by the ADA during the criminal proceedings. The Court found that Deputy District Attorney Hatlestad did not "admit" there was no probable cause. *Id.* The Court, after reviewing the evidence, found instead that "[c]ontrary to Hallman Chevrolet's position, D.D.A. Hatlestad's statement actually affirms the existence of probable cause." *Id.* at App. 14-15.

The Ninth Circuit, in upholding summary judgment, acknowledged, discussed, and properly followed controlling Supreme Court and statutory law with respect to absolute immunity. In reviewing the decision of the district court, the Ninth Circuit cited to and applied the proper standard of review. A district court judge, after its independent review of the facts, found that there was probable cause to seek an indictment of the plaintiffs. The Ninth Circuit, upon its independent review of the facts, unanimously agreed.

Petitioners seek clarification from this Court where no clarification is needed. Neither the district court nor the Ninth Circuit wrestled with what law to apply or how to apply it to the undisputed facts of this case. The district court properly reviewed the material facts and the Ninth Circuit, in a *de novo* review, completely and wholly agreed with the district court's factual determinations. As the law of absolute immunity is clear and unambiguous in this context, Petitioners essentially ask this Court to take on a role of a trial court to review factual findings that were made consistently and unanimously by the lower courts. Such is clearly not the proper role of the United States Supreme Court.

III.

THE LOWER COURTS DID NOT IMPROPERLY REJECT THE PURPORTED FINDINGS OF THE STATE TRIAL COURT.

In determining whether to grant certiorari, this Court looks for, among other things, conflicts between a lower court and this Court, between two federal circuit courts of appeal, or between a federal court and a state court of last resort.

SCR 10. None of those factors appear in this case. However, Petitioners argue that there is a conflict between the lower federal court decisions in this case and a decision of the state court trial judge who dismissed the criminal charges.

Petitioners argue that the federal courts that ruled on this civil rights case should give comity to the state trial court's findings in the underlying criminal case. First, it must be noted that Petitioners cite not a single case in their Petition, from this Court or otherwise, to support their argument. Second, Petitioners raised this same argument in the courts below in the context of estoppel. However, the Ninth Circuit properly rejected the Petitioners' estoppel argument based on the specific facts of this case. *See* Pet. App. 16. In sum, both lower courts considered the state trial court decision and gave that decision the deference that it was due. Both lower courts realized that the state court opinion, while it may have been the genesis of the civil rights claims herein, was not dispositive of federal civil rights claims. There is simply no basis for further review of those lower courts' decisions on this issue.

IV.

CERTIORARI SHOULD BE DENIED AS TO PETITIONERS' SEVENTH AMENDMENT CLAIM, SINCE THEY ARE ASSERTING IT FOR THE FIRST TIME AND NO EXCEPTIONAL CIRCUMSTANCES EXIST WHICH WOULD WARRANT CONSIDERATION OF THIS CLAIM.

In their Petition for Writ of Certiorari, Petitioners assert for the first time in this litigation that the Seventh Amendment right to jury trial should preclude the granting

of summary judgment on the basis of immunity "when there are material facts in dispute." Petitioners did not raise this issue before the Ninth Circuit Court of Appeals; thus, it formed no part of the basis for the lower court's decision.

In the past, this Court has refused to review arguments which were raised for the first time on appeal and were not considered by the court below. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988) (Stating that "[w]e shall deal with the case as it came here and affirm or reverse on the ground relied on below."); *see also Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379, n.5 (1996). The exception to this rule is limited and has been sparingly applied "only in exceptional cases coming . . . from the federal courts." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Among the cases which have been considered exceptional enough to warrant departure from the rule is *Pollard v. United States*, 352 U.S. 354 (1957). In *Pollard*, the collateral consequences of an unrepresented defendant's criminal sentence were found to be sufficiently substantial to allow the Court to deal with an issue which had not been raised below by the defendant in a pro se habeas corpus proceeding. 352 U.S. at 359. In a later civil case, the resolution of a conflict between state welfare statutes and the federal Social Security Act was deemed significant enough to justify a remand to the district court to allow the appellant to litigate a Supremacy Clause argument which had been raised for the first time before the Supreme Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). In another case involving exceptional circumstances, the Court found that the "important, recurring issue" of the availability of a direct

remedy under the Constitution where the facts alleged also supported an action under the Federal Tort Claims Act warranted departure from the rule. *Carlson v. Green*, 446 U.S. 14, 16-17 (1980).

Unlike those unusual situations where consideration was given to an argument raised for the first time before this Court, Petitioners have not raised an exceptional or compelling issue in their Petition for a Writ of Certiorari which would excuse departure from the Court's usual rule. It is well established in this Court's jurisprudence that summary judgment does not violate the Seventh Amendment, since there is no right to a jury trial in civil cases unless there are issues of fact to be determined. *In Re Peterson*, 253 U.S. 300, 310 (1920); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Further, despite Petitioners' characterization of this as an issue of law, they are actually asserting error in the form of erroneous factual findings. In its decision, the Ninth Circuit Court of Appeals expressly found that whatever issues of fact may have existed were not material and thus did not preclude the granting of summary judgment. Pet. App. 13; 169 F.3d 636, 643 (9th Cir. 1999). Factual error is not a compelling basis for the issuance of a writ of certiorari pursuant to Supreme Court Rule 10. Accordingly, the Petition should be denied.

CONCLUSION

Petitioners argue here, as they did in opposing summary judgment, in moving for reconsideration, in appealing final judgment, in moving for rehearing, and in applying for an *en banc* review, that the lower courts did not get the facts right. They argue that it was wrong for the lower courts to find probable cause based on the evidence that was before those courts. They argue that there were material issues of disputed facts with regard to the application and issuance of search warrants. Those factual arguments have been repeatedly heard and properly rejected on every occasion that they have been set forth. Yet Petitioners continue to make them, despite this Court's admonition that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . ." SCR 10.

Petitioners do not, and can not, argue that there is a conflict between the decision of the Ninth Circuit and the decision of this Court, another federal court of appeal, or the Nevada Supreme Court. Further, they do not argue that the district court or the Ninth Circuit Court of Appeals applied the wrong law to the case. For these reasons, and as fully discussed herein, the D.A. Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 99-52

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, et. al.,

Petitioners,

–against–

DOROTHY NASH-HOLMES, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE LAW RELATING TO PROSECUTORIAL IMMUNITY IS NEITHER CLEAR NOR UNAMBIGUOUS

Defendant's Brief in Opposition reiterates the disputed factual claims made by the defendants in the courts below but does not squarely confront the questions posed by the Petition -- questions relating to when a prosecutor charged with violating an individual's civil rights is absolutely immune from suit under the civil rights statutes, and to the delicate relationship between state and federal courts in the criminal justice and civil rights arena.

Defendants assert that "it is the clear and unambiguous law of the land" that prosecutors have absolute immunity for any actions they take in presenting evidence to a grand jury. (Brief in Opposition at 8) But whether that proposition, in fact, is the "law of the land" is far from clear.

In Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993), this Court stated that a prosecutor does not enjoy absolute immunity before "there is probable cause to have anyone arrested." The Court did not say, as the defendants seem to believe, that once a prosecutor convenes a grand jury, he immediately is cloaked with absolute immunity. Indeed, the prosecutor in Buckley presented fabricated evidence to a grand jury, but, nevertheless, was not held to be protected by absolute immunity.

Buckley established that, because the grand jury serves several functions, a prosecutor appearing before an investigative grand jury may be functioning not as an advocate, but as an investigator. For example, a prosecutor concerned about corruption in the police department might convene an investigative grand jury to determine if any crimes have been committed. If this Court's pronouncement in Buckley means what it seems to mean, then that prosecutor's actions before that

investigative grand jury would not necessarily be cloaked with absolute immunity (although the prosecutor might still be protected by qualified immunity), if the prosecutor did not have probable cause to have anyone arrested while he was employing the grand jury as an investigative tool. And that would seem to be true even if the grand jury later issued indictments.

In short, despite defendants' contention to the contrary, the law as it relates to prosecutorial immunity is not "clear and unambiguous," particularly as it applies in this case. Here, there was a year long investigation by the police but no arrests were made. When Deputy District Attorney Donald Coppa finally convened a grand jury, he did not identify for the grand jurors any particular crimes that had been committed by the suspects. Instead, he began each session by announcing that the grand jury's function was to "investigate" the dealership's business practices. The state court expressly found that the grand jury was acting in an investigative function. Nevertheless, the Ninth Circuit, adopting the defendants' position, created a bright line test, holding that all of the prosecutor's conduct after convening the grand jury was protected by absolute immunity. Whether Buckley sanctions such a bright line test is a question this Court should decide.

The defendants also misapprehend the serious and complex questions posed by the federal court's disregard of the state court opinion. That opinion found repeated, gross improprieties committed by the prosecutor before an investigative grand jury. The state court also accepted the representations of a Deputy District Attorney that there was not even "slight or marginal evidence" to support any of the charges against Stanko and the dealership, and dismissed those charges, and found that there was insufficient evidence to support the remaining counts against the remaining defendants. Based on all of its findings, the state court dismissed the indictment with prejudice.

The question presented for this Court is not, as defendants suggest, whether "estoppel" technically precluded the federal courts from revisiting these issues. The question is whether, as a matter of comity, the federal courts should give some degree of deference to state court rulings which establish the absence of probable cause to support an arrest.

Finally, the Brief in Opposition does not even mention one of the related questions posed in this Petition: that is, whether a federal court can bestow absolute immunity on a prosecutor by "finding" that the prosecutor had probable cause to arrest an individual, not for the crimes spelled out in the arrest warrant, but for some other unspecified, unidentified crime. The Ninth Circuit opined that the prosecutors had probable cause to arrest some of the dealership's salesmen for something -- although the Court never said what. Consequently, according to the Ninth Circuit, the prosecutors were acting as "advocates" under Buckley and were entitled to absolute immunity.

The defendants have not attempted to defend the Ninth Circuit's creation of "probable cause in the abstract." Whether such a concept is consistent with the Constitution is itself a difficult question that this Court should resolve.

II. PETITIONERS PROPERLY RAISED THEIR SECOND QUESTION IN THE COURT BELOW

Defendants argue that certiorari should be denied on the second question posed in the Petition because it was not raised before the Ninth Circuit. That is not true. Throughout their Brief to the Ninth Circuit, petitioners argued that the standard federal rules governing summary judgment should apply to the defendants' motions for summary judgment on immunity grounds, and that all disputed issues of fact should be resolved in their favor, and the record read in the light most favorable to the plaintiffs.

The Ninth Circuit, while paying lip service to this standard, simply ignored it, resolving virtually every factual dispute in favor of the defendants, and reading the record in the light most favorable to the defendants.

This Petition asks this Court to squarely address what the Ninth Circuit's decision implies -- whether there are special circumstances when state officials raise immunity defenses that alter the traditional rules that apply to summary judgment. If, in fact, the traditional rules are not to be followed in civil right cases, then this Court should also consider whether the Seventh Amendment right to a jury trial is violated if summary judgment is granted despite the existence of material, disputed facts. These questions have been preserved for this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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